Supreme Court of the United States.

OCTOBER TERM, 1904.

NO. 194.

THE RIVERDALE COTTON MILLS OF GEORGIA,

Petitioner,

vs.

THE ALABAMA AND GEORGIA MANUFACTURING COMPANY OF ALABAMA,

AND

THE HUGULEY MANUFACTURING COMPANY OF ALABAMA,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Fifth Circuit, New Orleans, La.

BRIEF OF

JOHN T. MORGAN,
Solicitor for Respondents.

JOHN M. CHILTON,
WILLIAM S. THORINGTON,
ROBERT PORTER SHICK,
Of Counsel.

STATEMENT OF THE CASE.

I.

THE ROBINSON BILL FOR FORECLOSURE IN FEDERAL COURT OF GEORGIA.

On January 21st, 1891, J. J. Robinson, a citizen of Alabama, as one of the trustees for mortgage bondholders, filed his bill against the mortgagor, The Alabama and Georgia Manufacturing Company, averred in the bill to be a corporation created under the laws of the State of *Georgia*, and against The Huguley Manufacturing Company, averred in the bill to be a corporation created under the laws of the State of *Georgia*, and, also, to be the purchaser of the equity of redemption to the mortgaged property, and against W. T. Huguley, the other trustee, averred to be a citizen of Georgia, and to have an interest in the property in conflict with the trust. (Rec. p. 1.)

The mortgage was attached as an exhibit to the bill, describing all of the property — lands, cotton mill plant, and village—as located wholly *in Alabama*, except certain detached and valueless islands (also situate in Alabama), which were erroneously described as being in Georgia. (Rec. pp. 5-6, 490-1, 498-9, 507.)

The bill sought an account of the mortgage debt, foreclosure and sale, a receiver, an injunction, general relief, and subpœna; the second clause of the prayer being, that orator might have a decree in his favor against the said The Alabama and Georgia Manufacturing Company (the *Georgia* corporation); that *it* should pay the sums found to be due, and that in default the said The Alabama and Georgia Manufacturing Company, and any and all persons claiming under *it* (the *Georgia* company) should be foreclosed of and from all equity of redemption, etc. (Rec. pp. 3-4; Op. C. C. A. 555, 127 Fed. 500-1.)

But no receiver was ever appointed and no injunction was ever granted, (Rec. pp. 8-9.) There was no service of subpœna upon the bill, (Rec. p. 488), but service was acknowledged by W. T. Huguley (personally), and by the *Solicitors* for the Georgia corporation sued, (Rec. p. 8,) and said solicitors appeared and demurred to the bill, and their demurrers being overruled by the court, they filed their answers (Rec. pp. 9-

22); and to their answers complainant filed the general replication. (Rec. pp. 23, Op. C. C. A. 555-6, 127 Fed. 501.)

The cause proceeded to trial and there was a decree *in rem* against The Alabama and Georgia Manufacturing Company of *Georgia*, "*one* of the defendants herein," of foreclosure and sale for payment of the entire debt. (Rec. pp. 130-3.)

Pursuant thereto, on Sept. 6, 1892, the property was sold in Atlanta, Georgia, to Lanier, Dallis and Kirby, committee for the bondholders, and a deed made by the *commissioner, only.* (Rec. pp. 151, 313-4.) Thereupon, the purchasers obtained a charter under the general laws of Alabama for "The Galeton Cotton Mills," (Rec. pp. 495-7,) all of the stock being in turn concurrently assigned and transferred to the "West Point Manufacturing Company," another and neighboring Alabama corporation, (Rec. pp. 188, 219-221, 303-310, 320, 324-5,) which company thenceforth operated the plant and took the rents and profits. (Rec. pp. 489-490.)

On appeal by respondents to the Circuit Court of Appeals, at New Orleans, the decree was reversed and set aside, all subsequent proceedings being declared "vitiated," and the cause remanded. (Rec. p. 364, 6 C. C. A. 79, 56 Fed. 690.)

In conformity therewith, the lower court entered its decretal order granting petitioners restitution of the property and an accounting upon certain conditions precedent, (Rec. pp. 324-5, 329-330,) with which petitioners declined to comply.

Thereupon the Circuit Court entered, on March 30, 1895, its modified decree—which was likewise *in rem*—against the said sole defendant in foreclosure, the *Georgia* corporation of The Alabama and Georgia Manufacturing Company, authorizing also execution for any *balance* or *deficiency over.* (Rec. pp. 356-362.)

Respondents appealed therefrom (Rec. pp. 362-7,) to the Circuit Court of Appeals and that court, while affirming the decree below, yet directed the reference for accounting to proceed, (19 C. C. A. 152, 72 Fed. 712,) and the lower court duly entered its decretal order accordingly. (Rec. pp. 385-6.)

We will not tax the court by following the proceedings on the reference, other than to refer, in passing, (for the purposes made clear under our argument further on,) to the gross fraud perpetrated thereunder and imposition upon the court by the accounting parties in the tender of certain books of account, (ledger and journal,)—which, though vouched for by L. Lanier and one Wellington, the chief officials, as honest books of *original* entry, on which they rested their whole defense, nevertheless were afterwards proven (by the expose of the "water-marks") to

be palpable FORGERIES. (Rec. pp. 407, 457-9.) Suffice it, pending said reference, under order of March 10, 1896, (Rec. p. 383,) the property was offered for sale on May 6, 1896, this time at Hamilton, Harris County, Georgia, and again knocked down to said L. Lanier "for and on behalf of the holders of the bonds," and so reported (Rec. pp. 390, 391,) and on June 25, 1896, the sale was *conditionally* confirmed, the *commissioner* being "authorized and directed to convey to said purchasers named—(the *bondholders*)—all and singular the property and the property rights of every description described (in) said decree, *upon the purchaser complying with the terms of said sale.*" The decree goes on to vest in Movants a preferred lien for whatever sum of rents and profits might thereafter be awarded under the reference then pending. (Rec. pp. 395-6.)

As late as Sept. 22, 1898, it developing that there had been *no* compliance, through said Lanier's confessed inability to control the bonds committed to the bid (Rec. pp. 440-4, 446,) the Circuit Court, on October 15, 1898, so modified its original decree as to lift and dissolve the lien previously vested in Movants for the rents, transferring same to the proceeds of sale, and so changing the terms and parties as to authorize its *commissioner* to accept a stated sum in *cash* in lieu of *bonds, supra,* for the purchase money; the particular terms of the said decree providing as follows:

" And it is ordered and decreed that the purchaser do pay
" into court within forty days from this date, the whole of
" the balance of the purchase money of said property * * *
" and that, *upon certificate of the Clerk* of the fact of such
" payment, thereupon the *Commissioner*, S. C. Dunlap, Esq.,
" *do execute and deliver* to said purchaser (Lanier) or such
" person as he may designate, a deed to the property sold,"
" etc. (*Without more.*) (Rec. pp.446-7.)

But, so far as the record discloses, there is *no evidence*, whether in the form of the said stipulated "*certificate* of the Clerk," or by *deed*, or otherwise, showing or tending to show that there ever was "within forty days from this date" or thereafter, "the fact of such payment," in compliance with the terms of said interlocutory decree of Oct. 15, 1898, or that Petitioner has any deed—even from the said Commissioner, only, as claimed. (See Record, p. 447, *et seq.*, which is wholly silent upon the subject.)

In that state of the record, there was an appeal from the said decree of Oct. 15, 1898, and the other interlocutory de-

crees preceding, to the Circuit Court of Appeals, resulting in an affirmance.

94 Fed. 269.

Respondents undertook to review the last decree of affirmance on application to this court for writ of *certiorari*—but the effort failed.

175 U. S. 726.

Thereupon, the two Georgia corporations and W. T. Huguley sued out an appeal to the Supreme Court of the United States, but this court declined to take jurisdiction of the appeal.

184 U. S. 290.

II.

THE BILL FOR REDEMPTION IN STATE CHANCERY COURT OF ALABAMA.

On May 2nd, 1901, while the last mentioned appeal was pending in the Supreme Court, and undisposed of, The Alabama and Georgia Manufacturing Company and The Huguley Manufacturing Company filed their bill in the Chancery Court of the First District of the Northeastern Chancery Division of the State of Alabama, describing themselves as corporations duly created and organized under the laws of the State of *Alabama*, attaching charters, (Rec. pp. 494-5, 531-5, Op. C. C. A. 551-2, 127 Fed. 501,) and averring that the former, The Alabama and Georgia Manufacturing Company of *Alabama, was seized and possessed with the title* to all the lands and property, (Rec. pp. 486-7, 505, Op. C. C. A. 556, 127 Fed. 501), and that said lands and property were situate wholly in *Alabama*, (Rec. pp. 488, 490-1, 498-9, 507); setting out the proceedings under the Robinson bill in the Federal Court in Georgia, against the *Georgia* companies, but denying the effect of such proceedings upon the rights of the two *Alabama* corporations complainant, they not having been parties thereto, and seeking to have their right of redemption in the mortgaged property established and enforced, and an accounting for the rents and profits of $528,000, as charged. (Rec. pp. 486-500.)

To this bill, the West Point Manufacturing Company, the Galeton Cotton Mills, and the petitioner, The Riverdale Cot-

ton Mills, averred to be each a corporation under the laws of *Alabama*, and J. J. Robinson, trustee, a citizen of Alabama, and W. T. Huguley, trustee, a citizen of New York, were all made defendants, (Rec. pp. 486, 489, 492-4); and the three first named defendant corporations, on June 2nd, 1901, appeared in the Alabama State Court and filed joint and separate answers, demurrers, pleas and motions. (Rec. pp. 510-525, Op. C. C. A. p. 556, 127 Fed. 502.)

III.

THE INJUNCTION BILL IN THE FEDERAL COURT OF GEORGIA.

After so appearing in the Alabama State Court and pleading to the bill of the two Alabama companies, as above stated, the petitioner, The Riverdale Cotton Mills, now claiming to be a corporation under the laws of Georgia, (Rec. p. 473,) but offering no charter or other evidence, filed its bill in the Federal Court in Georgia, in which the Robinson suit had been formerly pending, against the two Alabama companies, complainants in the bill in the Alabama State Court, and their solicitors. Petitioner designated its said bill as a dependent or ancillary bill to the proceedings under the original Robinson bill, and asked for a writ of injunction against the two Alabama corporations and their solicitors to restrain the further prosecution of their suit in the Alabama courts. (Rec. pp. 473-482, Op. C. C. A. 556-7, 127 Fed. 502.)

On the same day the judge of the Circuit Court passed an order that the defendants named show cause on the 20th of June, 1901, why an injunction should not issue as prayed for.

No service was made on The Alabama and Georgia Manufacturing Company of Alabama or on The Huguley Manufacturing Company of Alabama, but counsel of record for those companies, in the Alabama suit, who were individually made parties defendant, acknowledged service for themselves individually, and the marshal returned that he had served subpœnas on W. H. Huguley and W. T. Huguley at West Point, Ga. (Rec. pp. 501, C. C. A. 557, 127 Fed. 502.)

To this bill, on June 21, 1901, the two defendant Alabama corporations filed their answers, with exhibits. (Rec. pp. 505-535.)

On Oct. 8, 1901, the Federal Court in Georgia granted the prayer of the bill for a preliminary injunction, *pendente lite*. (Rec. pp. 535-540.)

The complainant filed no replication to the answer of defendants nor were exceptions filed to the sufficiency of defendants' answer. A motion was made by petitioner to strike the answer, but no action of the court was had thereon. The defendants stood on their objections to the jurisdiction of the court, supported by exhibits to their answer, and by the face of the record. (Rec. pp. 505-535, Op. C. C. A. p. 557, 127 Fed. 502.)

A petition of the defendants for a writ of prohibition was denied in the Supreme Court of the United States, as premature, February 24th, 1902.

In re Huguley Manufacturing Company, 184 U. S. 297.

On Sept. 29, 1902, the Circuit Court rendered a final decree, perpetually enjoining the defendants and all persons claiming under them, from further prosecution of the Alabama suit. (Rec. pp. 539-540.)

From this final decree the two Alabama companies sued out an appeal to the Circuit Court of Appeals (Rec. pp. 540-550,) where the decree was, on Jan. 12, 1904, reversed, with directions to dismiss the bill. (Rec. pp. 551-560, 127 Fed. 497-505.)

Thereupon, the appellee, the Riverdale Cotton Mills, filed its application for a rehearing, but the prayer was denied. (Rec. pp. 565-573.)

To review said last named decree of the Circuit Court of Appeals, the petitioner, The Riverdale Cotton Mills, filed in this court a petition for the writ of *certiorari*, by which the proceedings in the Circuit Court of Appeals are now before this court. (Rec. pp. 573-574.)

We have not undertaken to set out in detail the complete contents of the various pleadings above referred to, nor the proceedings thereon, for the reason that they may be found in the brief filed in this court by our associate counsel, Marion Erwin, Esq., on behalf of respondents, and because the facts and pleadings of record have, in part, been so accurately and fairly presented under the review found in the able opinion of the majority of the Circuit Court of Appeals, at pages 551-7 of the said record, to all of which the attention of this Honorable Court is particularly invited.

127 Fed. 497-503.

We believe, however, that it will be of aid to the court, if not indispensable to a full and clear understanding of the case, for us to submit a preliminary statement of the facts embraced in, or suggested by, the record, and which shed light both upon the rights and motives of the respondents, the latter having been impugned, to some extent, by petitioner's counsel, and in the dissenting opinion of one of the judges of the Circuit Court of Appeals.

IV.

HISTORY OF CASE ANTEDATING BILL FILED IN FEDERAL COURT IN GEORGIA.

"THE ALABAMA AND GEORGIA MANUFACTURING COMPANY OF ALABAMA."

Incorporation—No power of Consolidation—Feb. 7, 1866.

On Feb. 7, 1866, by act No. 183, the General Assembly of the State of Alabama, upon the petition of James Metcalfe, George Huguley, Benjamin H. Hill, William P. Chilton and George W. Huguley, as original incorporators, granted a charter creating the corporation duly entitled:

"The Alabama and Georgia Manufacturing Company,"

with principal office "in the County of Chambers, and in the State of *Alabama*," and authorized to acquire lands and operate thereon certain cotton mills situate on the *Western*, or *Alabama*, side of the Chattahoochee river.

Neither the original incorporators nor their successors ever petitioned for privilege to *merge* or *consolidate* with any other company, whether of the same name or of any other name, or to establish or maintain any branch office or 'agency,' or to transact corporate business, outside of Alabama; and no such power or privilege to do either of these acts was ever granted by the Legislature of the State of Alabama.

The complete text of the charter so granted to the said The Alabama and Georgia Manufacturing Company—hereinafter called, for sake of brevity, "Alabama Company,"—is set out in the transcript of record, as certified up from the Circuit Court of Appeals for the Fifth Circuit, (Rec. pp. 486, 494-5,) and is also reproduced in full in the opinion of that court. (Rec. pp. 551-2, 127 Fed. 497-8.)

Organization of the Alabama Company—Capital Stock Subscribed and Paid In—Plant Established, Equipped and Paid For—1866.

The said incorporators and their associates, after securing said charter on Feb. 7, 1866, lost no time in perfecting their organization as "The Alabama and Georgia Manufacturing Company," in strict conformity with all the forms and ceremonies prescribed by the Alabama statutes. That is to say, between said date and March 20, 1866, corporate meetings were regularly called and held in Alabama; by-laws were submitted and adopted by its stockholders; directors and officers were elected; books of subscription to the capital stock were opened and the full amount of said capital stock ($156,000) was there and then, to-wit, *on and before March 20, 1866,* duly subscribed, and the larger proportion paid in, and from the proceeds thereof the lands in controversy were all acquired, the manufacturing plant, mills, warehouses, operative and other houses, were constructed, the machinery installed, and the property made a going concern during the year 1866, —all paid for with the money so subscribed and paid into the treasury of the said *Alabama* Company, pursuant to said subscriptions by its shareholders to its capital stock. (Rec. pp. 486-7, 494-5, 505, 177.) The fact of said subscriptions to said capital stock, and of the payments thereunder, and itemized expenses incident to such disbursements on lands and construction account, dating from the inception of this enterprise on Feb. 7, 1866, as well as the minutes of the proceedings from time to time, were all made matters of official record upon the books of said *Alabama* company, and with the original title deeds, are now in the custody of W. H. Huguley & Company, Secretary-Treasurer, and Manager.

Title to Lands and Property Vested in the Alabama Company 1866.

Pursuant to the granting of said charter on Feb. 7, 1866, and promptly thereafter, to-wit, *on and before the 20th day of March, 1866,* as the initial step preliminary to the formal inauguration of said manufacturing enterprise, all the lands in controversy, and "also riparian rights or water privileges in any wise belonging to the same at any and all points, * * * * together with all and singular the tenements, hereditaments and appurtenances thereunto in any wise appertaining," were duly acquired by said *Alabama* Company from one James Campbell, owner thereof and a resident of Cham-

bers County, Alabama. A warranty deed, duly and regularly acknowledged before one James M. Hill, a justice of the peace in Alabama, and delivered to said corporation grantee, and filed in office and recorded in the Record of Deeds, Vol. 15, pp. 34-5, of the Probate Court of Chambers County, Alabama, vested the legal title in and to all the said lands and property in the said original *Alabama* Company, its stockholders, "their heirs and legal representatives forever,"—the said corporation grantee being more particularly identified and its habitat or citizenship located by the specific terms of the said instrument itself, as "The Alabama and Georgia Manufacturing Company *of the State of Alabama, Chambers County.*"

As a matter of fact and of law, said Alabama Company was duly organized, its lands acquired, and its title was so vested in 1866, as explained, before the charter to the Georgia Company, likewise entitled "The Alabama and Georgia Manufacturing Company," was ever granted. And that title has since then never passed out of that Alabama Company by any valid judicial order or decree or conveyance thereunder, whether under State or Federal procedure, or through any legislative act. (Rec. pp. 177, 486-7, 505, Op. C. C. A. 556, 127 Fed. 501.)

"THE ALABAMA AND GEORGIA MANUFACTURING COMPANY OF GEORGIA."

Not the "Alabama" Company "Domesticated" in Georgia, but a Distinctly Independent and Separate Corporate Entity of Georgia.—March 21, 1866.

In order to carry out the general plans and purposes of the incorporators and organizers of the said *Alabama* Company, thus already organized and established, it was deemed necessary and important that these same original incorporators and organizers of the said Alabama corporation and their successors should control the water rights of the Chattahoochee river not only through the riparian rights already granted them on the *Western* or *Alabama* side of the river by the State of Alabama, but through those of the State of Georgia on the *Eastern* side of the river as well, *i. e.* at the point on the eastern bank opposite where their manufacturing plant in Alabama had already been located. These incorporators had in view the then purpose of utilizing, if not immediately, at least at some future time, the recognized fine water power of the intervening Chattahoochee river, by the

proposed acquisition of other lands on the eastern or Georgia side of the river, and the erection thereon of another *independent* manufacturing plant, and in such event, of using Columbus, or LaGrange, Georgia, for *its* offices and shipping points. To that end, the said incorporators did not elect to ask the Legislature of Georgia for any express statutory license authorizing the *pre-existing Alabama* company to exercise in Georgia the same powers and rights which had been given it by the parent State of its creation (*Alabama*), *i. e.*, that it be *"domesticated"* in Georgia by the laws of that State, but the application was for the creation of a *separate* and *independent* corporation under the same name; and, on March 21, 1866, "The Alabama and Georgia Manufacturing Company," as a second, distinctly independent corporation, was granted a charter by the Legislature of the State of Georgia, hereinafter, for brevity, called the "*Georgia* Company." (Op. C. C. A., Rec. p. 558.)

The complete text of said Georgia charter appears in the record certified up from the Circuit Court of Appeals, at pp. 529-531, and is also incorporated in full in the opinion of that court. (Rec. pp. 552-4; 127 Fed. 498-9.)

The Georgia Charter—Important Provisos Restricting Ownership and Operation of Property Acquired by the Georgia Company (if any) to the Territorial Jurisdiction "on the East (Georgia) Side of the River."—Other Significant Limitations Imposed, and Powers Denied to It.—All Distinguishing the "Georgia" Company from the Pre-existing "Alabama Company.—March 21, 1866.

Among other terms and conditions, expressed and implied, in the said charter as granted by the Legislature of Georgia, we here note only the more material and significant ones:

Powers and Privileges Granted.

1.—To acquire lands and erect all needful buildings *"on the East Side of the River"* (Chattahoochee.)—Sec. VI of Charter, Rec. p. 530);

2.—To control and use the water of the Chattahoochee river, so far as the riparian rights of *Georgia* are concerned, by locks, dams, canals, or otherwise; * * * half way across the Chattahoochee river, etc., and to use for that purpose the islands *contiguous* to their lands for abutments, etc. (Sec. IV of charter, Rec. p. 530.)

Exceptions and Provisos.

"*Provided,* That nothing in this Act shall be so construed as to give said corporators, or their successors, *the privilege to interfere with or disturb the vested rights* of any person or persons whomsoever, either on the East or West bank, or *the islands in,* the Chattahoochee river."—(Sec. II of Charter, Rec. p. 530.)

Powers Reserved and Denied.

1.—*To merge or consolidate* with any other corporation, whether under the same name or any other name;

2.—*To renew or extend* the said charter, after it should have expired by the limitation of thirty years, as fixed by the Georgia statute, *to-wit, March 21, 1896.*

The Huguley Manufacturing Company of Alabama, Chartered as such Corporation of Alabama, by and Under Orders of J. J. Robinson, Judge of Probate of Chambers County, Alabama.—Feb. 27, 1890.

It affirmatively appears on face of the record in this cause, that during the incumbency of J. J. Robinson, as Judge of Probate of Chambers County, Alabama, and under official orders duly issued by him in that capacity, on Feb. 27, 1890, a charter was regularly granted to the said corporation entitled "The Huguley Manufacturing Company," with its fixed principal office and place of business, according to its terms, "*in Chambers County, Alabama, near the Factory lately known as 'the Alabama and Georgia Mills.'*"

The complete proceedings thereunder attending the perfection of the organization of the said *Alabama* Company, in pursuance of the laws of Alabama, *including the subscriptions to its capital stock, the undertakings of the subscribers thereto, and the descriptions of the property conveyed or to be conveyed to said Alabama Company,* are all fully set forth in detail in the Record at pages 531-5.

No power or privilege to merge or consolidate with any other corporation, whether of same name or any other name, was provided in the said Alabama charter.

The Huguley Manufacturing Company of Georgia, Chartered as Such Corporation of Georgia.

A copy of the last mentioned charter is not in the record, but the fact of such incorporation in Georgia is charged in the original bill filed by J. J. Robinson, Trustee, against it in the Circuit Court of the United States for the Northern District of Georgia (Rec. p. 1.) It is also admitted in the answer filed by The Huguley Manufacturing Company of Georgia, to that bill, (Rec. p. 14.) It is also averred in the answer of the Riverdale Cotton Mills, *et al.*, to the Alabama bill, (Rec. p. 511.) It is also averred in the so-called ancillary bill of the Riverdale Cotton Mills, (Rec. p. 473). It is also averred in the petition for *certiorari*.

It is true that in the answer of The Huguley Manufacturing Company of Alabama, to said so-called ancillary bill (Par. 1, Rec. p. 506), it is stated *on information* that The Huguley Manufacturing Company of Georgia, the defendant to the Robinson bill, was not a corporation chartered under the laws of Georgia. But, it is distinctly averred in the 9th paragraph of said answer, (Rec. p. 508), that The Huguley Manufacturing Company, the Alabama corporation, was never a party to the said Robinson foreclosure suit.

It is now admitted by these respondents that the statement made on information in said answer was erroneous, though not intentionally so; that the fact is, that subsequent to the incorporation of The Huguley Manufacturing Company of Alabama, certain persons were incorporated under the same name, under the laws of Georgia, by the Superior Court of Troup County, Georgia, on April 29, 1890, on the petition of N. J. Hammond, attorney for the corporators. The scope of the respective charters were, however, widely divergent, the capital stock was different, and their places of business were different, one being in Chambers County, Alabama, the other at West Point, Georgia, and their incorporators were only in part the same.

As this Georgia charter is not in evidence, we can only take the fact shown by the record, that there was a Huguley Manufacturing Company, a corporation of Georgia, as well as a Huguley Manufacturing Company, a corporation of Alabama.

In the record of the Robinson suit, (Rec. p. 26,) there appears the testimony of N. J. Hammond, the attorney of record in that suit for The Huguley Manufacturing Company, defendant thereto. He there stated: "I advised in the procurement of the charter of The Huguley Manufacturing Company, and have been its attorney in this and other matters in

Georgia, since. When the bill in this case was filed, D. Jannopoulo, the president of The Huguley Manufacturing Company, instructed my firm to defend it for that company." The answer filed by Col. Hammond to the bill in that suit, (Rec. p. 14,) states specifically that it was the answer of the *Georgia* corporation.

While we insist that this testimony in the Robinson suit is not evidence against the Alabama corporations not parties to it, we call attention to it to show which corporation the attorney of record, in that case, claimed he was representing.

PRELIMINARY QUESTION.

IS THIS A PROPER CASE FOR REVIEW BY THE WRIT OF CERTIORARI?

Before any discussion of the questions raised in the Circuit Court of Appeals, we respectfully submit for the determination of this court, whether this case is of that class to which this court has, by its uniform decisions, restricted the issue of the writ of *certiorari* for the purposes of review, as distinguished from those cases where it is employed to perfect a record upon a suggestion of diminution; and whether, in the state of *this* record, the discretion in this court to issue such writ ought to be exercised.

As to the state of the record, it is to be observed, two of the judges of the United States Circuit Court of Appeals concurred in reversing, on a single point, the decree of the Federal Circuit Court in Georgia; and the third judge, while dissenting on that particular point, says: "There are some *other questions* raised in the assignments of error, the proper determination of which might require a *reversal* of the decree below."

We, therefore, submit to this court, that inasmuch as all the judges of the Circuit Court of Appeals concur that the decree of the Federal Court in Georgia should be, or might be, *reversed*, it is not at all improbable that the case upon such reversal might be determined upon some question or questions wholly different from those now sought to be reviewed in this court. In other words, will this court *anticipate*, under a writ of *certiorari*, which ought to be sparingly used, the determination of questions which, upon a reversal, (all the judges of the Circuit Court of Appeals agree should or might be had), may be entirely eliminated from the cause? We think the labors of a great court might well be confined to the consideration of such questions only as are necessary in a case before it, and that it is neither reasonable nor proper to appeal to it to anticipate questions that may never actually arise and which may prove to have been purely academic. It would seem that the mere fact of such a contingency would of itself, justify, if not require, a court whose labors are so constantly demanded in the settlement of pending, practical questions, to refuse to enter upon the determination of questions the settlement of which might prove to be of no aid to the lower court in its future proceedings.

That the decree of the Federal Court in Georgia should be reversed, is not merely a contingency, but, at least upon two points, seems to be clear:

1. The Circuit Court of the United States for the Northern District of Georgia, in its decree foreclosing the mortgage, under the Robinson bill, directed the sale of, and by its *commissioner* only, sold and, it is claimed, conveyed lands located wholly in Alabama, *without requiring any deed from the owner of the legal estate, the mortgagor corporation, or from the trustees.*

The decree was *in rem*, and not *in personam*, and against only the *Georgia* corporation, entitled "The Alabama and Georgia Manufacturing Company," which, under its charter, *did not and could not* own the Alabama property mortgaged, except certain riparian rights granted by the Legislature of Georgia to the Georgia corporation; whereas, the title in and to all the property in controversy had been throughout and was vested solely in the original *Alabama* corporation, also entitled "The Alabama and Georgia Manufacturing Company," but chartered and duly organized under the laws of *Alabama*, as a distinctly *independent* and *separate* corporate entity, with no power of merger with any other corporation;

2. In the cause under the so-called ancillary bill, in the Circuit Court of the United States for the Northern District of Georgia, the defendants (the two Alabama corporations) filed an answer to the bill.

There being no replication to this answer, its allegations must be taken as *true;* and there could be no evidence offered by the complainant to contradict any thing therein that is well alleged.

> Brown v. Pierce, 12 Wallace 212;
> Reynolds v. Crawfordville Bank, 112 U. S. 409.

Its allegations being taken as true, they undoubtedly ousted the jurisdiction of the Circuit Court, under the ancillary bill, and no valid decree could be rendered.

On the other hand, if complainant had filed a replication, it would have put it to the proof of every allegation in the bill. And if defendants had filed no answer, they would have been bound to take the bill *pro confesso*, before taking the final decree.

In either aspect, a reversal is inevitable.

That decree recites that, "this cause coming on further to be heard, it is submitted upon the bill *and proceedings in this cause,* ancillary to the proceedings in the cause lately pending in this court, of J. J. Robinson, as trustee, etc., vs. Alabama and Georgia Manufacturing Company, et al., and upon the record in said last named cause." (Rec. pp. 539, C. C. A. p. 557, 127 Fed. 502.)

It cannot, of course, be denied that this answer was part of the "proceedings" in the ancillary cause, and, therefore, by the very terms of the submission, was before the court. Not only before it, but in such shape that all of its allegations, including that (a) as to the citizenship of the Alabama corporations, and their separate existence in respect of the Georgia companies, and (b) the averments of the location of entire property in Alabama, and (c) the averments of the legal entitle being vested solely in the original *Alabama* corporation of The Alabama and Georgia Manufacturing Company, etc., —were all *admitted,* because not denied in any form.

Again, as declared by this court in "The Huguley Manufacturing Company v. The Galeton Cotton Mills," 184 U. S. 290, the case at bar is one of which the Circuit Court of the United States for the Northern District of Georgia, acquired jurisdiction only by virtue of the *diverse citizenship* of the parties and not by reason of any of the grounds set forth in section 5 of the judiciary act of March 3d, 1891, and that the judgment of the Circuit Court of Appeals, now sought to be reviewed by *certiorari,* was *final,* and therefore not subject to review in this court, except by writ of *certiorari* or some process *ejusdem generis* with *certiorari,* and issued, not as matter of right, but in the discretion of the court.

In respect of the exercise of such discretion, this court has said, it is "a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." And the court adds, "Accordingly, although there have been many applications to this court for writs of *certiorari* to the Circuit Court of Appeals, under this provision, *two only* have been granted." In one of those two cases, the court shows, there was involved a grave question of international law, affecting the relations between the United States and a foreign country, and in the other, an important question as to the rules of navigation, in which two judges of the Circuit Court of Appeals had reversed a judgment of the District Court against the dissent of one of the three Circuit judges.

American Construction Co. v. Jacksonville, etc., Railway Company, 148 U. S. 372, citing Lau Ow Bew, Petitioner, 141 U. S. 583, and *in re* Woods, 143 U. S. 202.

In view of these decisions, we invite the attention of the court to the fact that Judge Pardee, in his dissenting opinion, expressly said, "*The* (italics *his*) question is, whether or no the bill brought by the Riverdale Cotton Mills, purchasers under decrees in Robinson v. The Alabama & Georgia Manufacturing Company, *et al.*, is an *ancillary* and *supplemental* bill, within the cognizance and jurisdiction of the Circuit Court."

It is entirely apparent from the record, that Judge Pardee has correctly stated *the* question, or, at least, the *main* question presented to and decided by the Circuit Court of Appeals, and *the* question the writ of *certiorari* brings up to this court for its decision.

We submit that the question, whether a bill be original or ancillary, is a mere question of *practice,* and not one of that grave, general or peculiar importance which alone can call into existence the extraordinary jurisdiction inhering in this court to review a final decree of the United States Circuit Court of Appeals, under a writ of *certiorari.*

If, however, we take the question for review under the writ of *certiorari* to be as stated in the petition filed in this court on March 14th, 1904, at pages 10 and 11, of the petition, we think it may be safely said that none of them, to use the language of this court, "fall within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in respect to them."

Lau Ow Bew, Petitioner, 141 U. S. 583.

The questions, as stated in the petition, are as follows, to-wit:

"*First*—The effect of a decree or judgment against a corporation which is organized under the laws of several States, when sued as a corporation organized under the laws of one of those States.

"*Second*—The right of a defendant corporation which in good faith has been sued in a Circuit Court of the United States as organized under the laws of and as a citizen of one State and has admitted the truth of the allegations, to im-

peach the decree or judgment collaterally on the ground that it was in fact organized under the laws of another State, and that, therefore, the Circuit Court had no jurisdiction, because there was not the necessary diversity of citizenship.

"*Third*—The power of a Circuit Court of the United States to foreclose in one proceeding and by one sale a mortgage on real estate situated partly in one State and partly in another, when it has personal jurisdiction over the mortgagor.

"*Fourth*—The right of a Circuit Court of the United States to entertain as an ancillary bill a bill to restrain a suit brought in another court by persons bound by a decree of the Circuit Court to impeach a title derived under that decree, on grounds that already have been or might have been fully presented.

"*Fifth*—The effect of Revised Statutes, § 720, on the right of a Circuit Court of the United States to restrain proceedings in a State court brought by persons bound by a decree of the Circuit Court to impeach that decree and a title derived thereunder."

In respect of the first of these questions, it may be said, it is one as to which the decisions of this court and of the courts of nearly all jurisdictions are so uniform that it is now no question at all. The effect of a decree or judgment against a corporation which is organized, as an independent entity, under the laws of several States, *when sued as a corporation under the laws of one of those States*, is in the very nature of things to bind only the party or legal entity *sued*, and cannot bind the person, or legal entity of another State, *not sued*. As to this question, that uniformity of decision already obtains which the Petitioner urges as a ground for the issuance of the writ.

As to the second of Petitioner's questions, it is to be observed that this court can pass upon only such questions as are raised by the record; and, that however sincere and ingenious counsel may be in framing the questions they conceive or contend to be presented for review, the court will look to the whole record to determine what the real questions are.

Thus looking to the record, we respectfully insist that no such question can arise thereon as the second of Petitioner's questions. The assumption in this question that a corporation which *has been sued* in a Circuit Court of the United States, and admitted its citizenship, is undertaking to impeach the decree collaterally, on the ground that it was organized under the laws of another State, and that the court had no jurisdiction for the want of diversity of citizenship, is *not* the question which the record itself presents.

The Alabama and Georgia Manufacturing Company of *Alabama, was not sued* in the Circuit Court of the United States for the Northern District of Georgia; *not being sued, it did not admit* its citizenship to be in Georgia, nor is the corporation *that was sued* collaterally or otherwise attacking the decree.

The Alabama and Georgia Manufacturing Company, of *Alabama,* by which the bill for redemption was filed in the State Chancery Court of Alabama, was not a corporation *sued in good faith,* or otherwise, in the Federal Court in Georgia, nor is it in the Alabama suit, collaterally, or otherwise, impeaching the decree of the Federal Court as a decree against the *party sued* in that proceeding, viz., the *Georgia* corporation. The foreclosure proceedings in the Federal Court of Georgia are set forth in the Alabama bill not to impeach their effect as against the Alabama and Georgia Manufacturing Company of Georgia, which was the party thereto, but merely as inducement to show the interest, claimed by the parties to the Alabama bill, in the property in which the right of redemption was sought in the bill by the Alabama corporation. The Alabama bill does not deny the jurisdiction of the Federal Court over the Alabama and Georgia Manufacturing Company of Georgia, nor the effect of the said decree over that corporation, but does deny that, as to the *Alabama* corporation, the jurisdiction of that court, either as to its person or property, ever attached, because *it—the sole owner of the legal title to all the property in controversy*—was never a party or privy to the proceedings in the Federal Court in Georgia, and because the property is located *wholly in Alabama.*

The third question urged by Petitioner, viz., as to the power of a Circuit Court of the United States to foreclose, in one proceeding and by one sale, a mortgage on real estate situated partly in one State and partly within another, *when it has personal jurisdiction of the mortgagor,* is one that has never been denied either to the Federal or State courts, wherever the general principles of equity procedure obtain; but wherever that jurisdiction is sought to be exercised it has always been subject to the elementary maxim, "*Equity acts in personam.*"

Where a court of equity has jurisdiction of the *person* of the defendant, *having the legal title,* there can be no doubt of its power to compel the alienation of property beyond its territorial jurisdiction, through its control over the *person* of the defendant; not by its decree *in rem,* but by compelling the defendant, *having the legal title,* to convey. But, it is per-

fectly clear from the record in *this* cause, that the third question raised by the petition for *certiorari* is an *abstract* question. In the first place, the *Alabama* corporation of The Alabama and Georgia Manufacturing Company, *the owner of the property* embraced in the litigation, was never a party, and, therefore, *not* subject to the jurisdiction of the court, nor could it have been made a party without ousting the jurisdiction of the court in respect of the entire cause; and, lastly, if it should be conceded (but it is *not*,) that it was a party by privity or representation, the court proceeded *in rem* and *not in personam;* it rendered a decree of foreclosure and sale, and authorized a deed to the property, located wholly in another State, made by a master *commissioner* of its own appointment, instead of requiring the defendant, by a decree *in personam*, to execute a deed, or at least, to join in the commissioner's deed,—and this contemplates, of course, that the *true owner* of the said legal title should so join, and no other. As it was, in the case at bar, the deed of the master commissioner, alleged to have passed to Petitioner (but not proven,) was but the deed of the *court*, and could, no more than a decree of the court, operate to pass title to the property located without the State.

Watts v. Waddle, 6 Peters, 389;
Boyce v. Grundy, 9 Peters, 275;
Watkins v. Holman, 16 Peters, 26;
Carpenter v. Strange, 141 U. S. 87-106;
Lynde v. Columbus, C. & C. Ry. Co., 57 Fed. 993;
Guarantee Trust & Safe Deposit Co. v. Delta and Pine Land Co., 104 Fed. 5, (Decided May 30, 1901, by the Circuit Court of Appeals, for Fifth Circuit, and directly in point, *supra.*)
The Alabama and Georgia Mfg. Co. *et al.* v. The Riverdale Cotton Mills, Op. C. C. A., Rec. p. 560, 127 Fed. 497, 505.

As to the fourth question sought to be raised by the petition for *certiorari*, viz., the right of the Circuit Court of the United States to entertain as an ancillary bill a bill to restrain a suit brought in another court *by persons bound by a decree* of the Circuit Court, to impeach a title derived under that decree, on grounds that already have been or might have been presented, it may well be said, it is scarcely conceivable that the United States Circuit Court of Appeals could possibly have decided against such a proposition, and an inspection of the record shows it made no such decision. The point decided by the Circuit Court of Appeals, and on which this

fourth question is predicated, is that the United States Circuit Court for the Northern District of Georgia, had no jurisdiction to entertain a bill (original or ancillary,) to restrain a suit brought in a Chancery Court of Alabama for redemption under a mortgage or deed of trust, made by an Alabama corporation which was *not a party* to the foreclosure proceedings in Georgia, such bill being filed by the *Alabama* corporation of The Alabama and Georgia Manufacturing Company, the owner of the legal title to the property, and joined by The Huguley Manufacturing Company of Alabama, which likewise was not a party to such foreclosure proceedings. It is indeed difficult to understand how such a ruling presents a question of such grave or peculiar importance, or of such general interest, or which gives rise to such danger of such conflicting decisions, as to call for the exercise of the jurisdiction inhering in this court to review it by *certiorari*.

The fifth question is virtually the same as the fourth, and both are predicated upon the assumption (contradicted by the record), that the bill in the State Court in Alabama is filed by persons bound by the decree of the Federal Court in Georgia.

In the case from the 143 U. S. 202, *in re* Woods, *supra*, the questions sought to be reviewed by the writ of *certiorari*, were, (1), whether it is settled law in the State of Minnesota that a judgment of dismissal in a former suit, was not a bar to a second suit in the same cause of action; (2), whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of a case. And the writ was denied by this court because the question did not "fall within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in respect to them."

It may well be said that the real question sought to be reviewed by the writ in this case, in its last analysis, is whether the Respondents are estopped or precluded to file a bill for redemption in the State Court of Alabama, notwithstanding a decree of foreclosure of the mortgage rendered by the Federal Court in Georgia, to which proceedings the Respondents, the owner of the property mortgaged, were not parties or privies; a question which admits of no doubt, or, if it does, is of no more grave, public, general importance than that raised in the Woods case, and which this court refused to review by *certiorari*.

If we should state the question in still a different form, viz., whether, where two several States create corporations by legislative charters, composed of the same individuals, with the same management, and under the same name, but each with *different* vested rights and powers, is the resultant one corporate body in both States, or separate and distinct legal entities in each State, — we would not then have a question which is likely to arise as frequently, or to vex the Federal courts as much, as the question between employer and employe, involved in the Woods case, *supra*, and as to which uniformity of decision, because of the frequency of such cases, would be of more practical benefit than it would be in respect of the question we have last put, which so seldom comes before the courts.

We, however, respectfully urge, that by its former and repeated decisions, this court has already declared itself on this question, and there could be no lack of uniformity of decision if its deliverances are respected and followed,—as they have been by the Circuit Court of Appeals (majority opinion), in this case,—and as they should be in all the lower Federal Courts.

St. Louis & San Francisco Ry. Co. v. James, 161 U. S. 545;

Nashua & Lowell R. R. Co. v. Boston & Lowell R. R. Co., 136 U. S. 356;

Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Company, *et al.*, 174 U. S. 552.

After a careful review of many of the leading cases, this court, *in re* Nashua & Lowell Ry. Co. v. Boston & Lowell R. R. Co., cited *supra*, held as follows:

"From the cases cited it is evident that by the general law, "railroad companies created by two or more States, though "joined in their interest, in the operation of their roads, in "the issue of their stock, and in the division of their profits, "so as practically to be a single corporation, *do not lose their "identity;* and that each one has its existence and its standing in the courts of the country only by virtue of the legislation of the State by which it is created. The union of "name, of officers, of business and of property, does not "change their distinctive character as separate corporations."

A very interesting and instructive case on this question, and one which is also determinative, in favor of Respondents, of the vital point, on the merits of the case at bar, is that of the Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co., *et al.*, 174 U. S. 552.

The facts in brief are, that the plaintiff was created and organized as a corporation under the laws of the State of Indiana, with the usual corporate powers, and also with power to *consolidate* with other railroad companies in other States, and to indorse or guarantee the bonds of other railway companies under the laws of any adjoining State.

Afterwards the same company, by its corporate Indiana name, was incorporated under the laws of the State of Kentucky, with all the powers of Kentucky corporations, and also with power to indorse or guarantee the bonds of other railroad companies and with powers of *consolidation*.

The same company was likewise incorporated and also *consolidated* under the laws of the State of Illinois by its Indiana corporate name.

Afterwards the Louisville, New Albany & Chicago Railway Company, by a contract with a construction company, in which the former was described as a corporation *under the laws of the States of Indiana and Kentucky*, and the latter as a corporation under the laws of the State of Kentucky, agreed, among other things, to guarantee the payment of the bonds of a Kentucky corporation, called, in short, the Beattyville Company, in consideration of the transfer by the latter company of three-fourths of its capital stock. The bonds were issued with the guaranty in due form, but there was irregularity in the issue of the bonds growing out of a failure of the issuing company to observe one of the requirements prescribed by the statute of Kentucky for the issue of railroad bonds. The bonds were sold to purchasers for value without notice, except that one of the defendants, the Louisville Trust Company, bought part of its bonds *without* notice and part *with notice*, of the infirmity in their issue.

A bill was filed in the Circuit Court of the United States for the district of Kentucky by the Louisville, New Albany & Chicago Railway Company, describing itself as a corporation duly organized and existing under the laws of the State of Indiana, against the Ohio Valley Improvement & Construction Company, the Richmond, Nicholasville, Irvine & Beatty Railway Company, and the Louisville Trust Company, all corporations of the State of Kentucky, and against other citizens of Kentucky, New York, and Illinois, for the cancel-

lation of the contract between the New Albany Company and the Construction Company, and of a guaranty indorsed by the New Albany Company in accordance with the contract upon bonds issued by the Beattyville Company and held by the other defendants, and for an injunction against suits thereon.

Pleas to the jurisdiction, asserting that the plaintiff was a corporation and citizen of Kentucky, as well as demurrers to the bill for want of equity, were filed and overruled.

The Circuit Court of Appeals, reversing the decree of the United States Circuit Court for the District of Kentucky, in its decree, among other things, declared: "This guaranty is binding only on the Louisville, New Albany & Chicago Railway Company, a corporation of Kentucky. It is *not* binding on the Louisville, New Albany & Chicago Railway Company, a corporation of Illinois."

This court, on review of the case, speaking through Mr. Justice Gray, among other things, declared as follows:

"This court has often recognized that a corporation of one "State may be made a corporation of another State by the "Legislature of that State, in regard to property and acts "within its territorial jurisdiction, (citing authorities.) "But this court has repeatedly said that, in order to make "a corporation, already in existence under the laws of one "State, a corporation of another State, 'the language used "must imply creation or adoption in such form as to confer "the power usually exercised over corporations by the "State, or by the Legislature, and such allegiance as a State "corporation owes to its creator. The mere grant of privi-"leges or powers to it as an existing corporation, without "more, does not do this."

Pennsylvania R. R. Co. v. St. Louis, Alton & Terre Haute R. R. Co., 118 U. S. 290, 296;
Goodlett v. Louisville & Nashville R. R. Co., 122 U. S. 391, 405;
St. Louis & San Francisco Ry. Co. v. James, 161 U. S. 545, 561.

"As to the jurisdiction, it being clear that the plaintiff "was *first* created a corporation of the State of Indiana, "even if it was afterwards created a corporation of the State "of Kentucky, also, it was and remained, for the purposes "of the jurisdiction of the courts of the United States, a "citizen of Indiana, the State by which it was *originally* "created. It could neither have brought suit as a corpora-

" tion of both States against a corporation or other citizen of " either State, nor could it have sued or *been sued* as a cor- " poration of Kentucky, in any court of the United States;

Ohio & Mississippi R. R. Co. v. Wheeler, 1 Black, 286;
St. Louis & San Francisco Ry. Co. v. James, 161 U. S. 545;
St. Joseph & G. I. R. R. Co. v. Steele, 167 U. S. 659, 663;
Barrow Steamship Co. v. Kane, 170 U. S. 100, 106."

Again, in speaking of the effect of the incorporation by a State of a corporation which was already incorporated in another State, the court said:

" But whatever might be the effect of such legislation, in " the way of subjecting foreign railroad companies to con- " trol and regulation by the local laws of Arkansas, we can " not conceive that it avails to create an Arkansas corpora- " tion out of a foreign corporation in such a sense as to " make it a citizen of Arkansas, within the meaning of the " Federal Constitution, so as to subject it as such to a suit " by a citizen of the State of its origin. In order to bring " such an artificial body as a corporation within the spirit " and letter of that Constitution, as construed by the decis- " ions of this court, it would be necessary to create it out of " natural persons, whose citizenship of the State creating it " would be imputed to the corporation itself."

In addition to the above quotations from the opinion of this court in said cause, it was further held, as follows:

" That court, in its opinion and decree, undertook to deter- " mine whether the Louisville, New Albany & Chicago Rail- " way Company was liable upon the guaranty as a corpora- " tion of Kentucky and as a corporation of Illinois. Apart " from the question whether it was a corporation of Ken- " tucky, and from the difficulty of treating the negotiable " guaranty upon each bond as itself divisible, binding the " guarantor as a corporation of one State, and not binding it " as a corporation of another State, there is an *insurmount- " able* objection to the decree in its present form.

" The Louisville, New Albany & Chicago Railway Company " is a party to this suit as a corporation of Indiana only, and " not as a corporation of Kentucky. It could not, either as a " corporation of both States, or as a corporation of Ken- " tucky only, have brought this suit against corporations and " citizens of Kentucky in the Circuit Court of the United

" States for the District of Kentucky, *without ousting the*
" *jurisdiction of the court.* (Authorities.) And citizens of
" Illinois also being defendants to the bill, it is equally im-
" possible to take jurisdiction of the plaintiff as a corpora-
" tion of Illinois. It necessarily follows, that *the rights and*
" *liabilities, if any, it may have as a corporation of Ken-*
" *tucky or as a corporation of Illinois, cannot be adjudicated*
" *in this case.*"

In respect of the case at bar, it is clear that the Georgia act creating the corporation entitled "The Alabama and Georgia Manufacturing Company," neither purported to create nor in effect created, the *Alabama* corporation of that name a corporation of the State of Georgia, and that if such had been the plain purpose and effect of the Georgia statute, the *Alabama* company would, nevertheless, have remained an *Alabama* corporation for all purposes of jurisdiction in the Federal Courts and the *Alabama* corporation could not sue *or be sued* in the Federal Court in Georgia, as a Georgia corporation. It could only sue and be sued as an *Alabama* corporation, and in the particular case at bar, it could *not* be sued in that court at all, for the reason that Robinson, the complainant, was, himself, a citizen of Alabama, and so described in the bill.

Again, The Alabama and Georgia Manufacturing Company, of the State of *Georgia, alone,* having been a party to that bill, it follows according to the principles declared by this court in the case above quoted from, that even if the mortgage to Robinson and Huguley, as trustees, had been executed by both the Georgia and Alabama corporations, it was not within the power or jurisdiction of the Federal Circuit Court in Georgia, in the Robinson case, by its decree, to adjudicate "the rights and liabilities, if any," of the *Alabama* corporation, in respect of the mortgage which that court undertook to foreclose.

It is to be remembered that the guaranty by the Louisville, New Albany & Chicago Railway Company of the bonds of the construction company, described the former company as a corporation *both under the laws of the State of Indiana and of the State of Kentucky,* yet, this court held that the right and liability of that company, as a corporation of Kentucky, could not be adjudicated by the Federal Court in Kentucky, under a bill field by said company as a corporation under the laws of Indiana.

In the case at bar, the mortgage sought to be foreclosed in the Federal Court in Georgia, neither purports to have been

executed by the *Alabama* corporation, nor is it so averred in the bill, but on the contrary, the bill avers it to have been executed by the *Georgia* corporation, only.

In view of these facts, and the decision of this court in the case above referred to, it requires no argument to show that the *rights and liabilities* of the Alabama and Georgia Manufacturing Company, as a corporation under the laws of *Alabama,* are unaffected by the decree of foreclosure in the Robinson case, rendered by the Federal Court in Georgia, and that being unaffected thereby, it had the right to resort to the Chancery Court in Alabama, to assert those rights, and it was without the power of the Federal Court in Georgia, to enjoin its proceedings in the said State Court of Alabama, instituted for the enforcement of those rights.

The same rule of decision prevails in Alabama.

Kahl v. Memphis & Charleston R. R. Co., 95 Ala. 337.

In the case last cited, it is held that the Memphis & Charleston Railroad Company, incorporated by legislative acts in Alabama, Tennessee, and Mississippi, though under the same name, owned by the same stockholders, invested with like franchises and operated under the same management, is composed of three several entities, and the averment that it is a unit as a corporation is a mere statement of a *legal conclusion* unsupported by the facts.

It is to be observed, however, that in stating the question as we have last above, it is most strongly put against the Respondents, and that the fact is, in the case at bar, the legislatures of the States of Alabama and Georgia did not enact *identical* statutes, or charters,—but the provisions of the two respective charters are *different materially and conspicuously in terms and legal effect,* as pointed out under our preliminary statement of facts hereinabove, at pages 9-15 of this brief.

> See Record, pp. 494-5; 529-531; and the Opinion of the Circuit Court of Appeals, in this cause, at pp. 551-4, wherein the text of each of the said charters is set forth in full; 127 Fed. 497-8-9.

As distinguished and differentiated at pages 9-15 of this brief (to which the particular attention of this court is respectfully invoked,) there can certainly be no question that the language of each charter creates a separate, complete corporation; that it is not the case of a corporation

created by one State and the same corporation *licensed* to carry on its business by and in another State, but each statute, *ex vi termini*, creates a *separate, independent corporate entity*, with its franchise to exist as a corporate body, its franchise to do business, and its *habitat* derived, each, from its several and distinct charter.

Nor is it the case of a *consolidated* company, created under statute in both States to take over the franchises, properties, rights and liabilities of two separate corporations created by different States, nor the surrender of jurisdiction by either State to the other over a consolidated company, or over the corporate lands and property within its territory.

Of however great importance, therefore, this court may deem the general question as to the power of two different States to create by joint legislative action one corporate unit, with like corporate existence and capacity in both States, it is quite manifest, *that* is not *the* question which the writ of *certiorari* will bring before it, but, on the contrary, the *real* question, brought up by the writ for consideration, is one, in respect of which the decisions of the Federal Courts, and of nearly all of the State Courts, are uniform.

It is respectfully suggested to the court, that inasmuch as the matter of granting writs of *certiorari*, for the purposes of general review, in cases where no appeal or writ of error will lie, is one of discretion in this court, it is highly important that its exercise should be limited to clearly defined classes of cases, beyond which the court will not depart. If it is to be understood that there is no fixed rule governing the court's discretion in such cases, it can scarcely be otherwise than that applications of this character will greatly multiply in the future, to such an extent, indeed, that litigants having no other recourse and influenced by a desperate hope, will, regardless of the nature of the questions sought to be reviewed, seek to procure a favorable exercise of the court's discretion in their cases.

It would seem, the only wise and safe rule is that adopted in the cases above cited.

ARGUMENT ON THE MERITS.

I.

WHAT CONSTITUTES THE RECORD BEFORE THIS COURT FOR REVIEW.

If this court should conclude that the petition presents questions both proper and necessary for review by writ of *certiorari*, then it becomes essential to consider *what* constitutes the record before this court for review.

We think it consists of the following, to-wit:

1.—The entire record of the proceedings (for redemption, etc.), in the case of The Alabama and Georgia Manufacturing Company of Alabama, and The Huguley Manufacturing Company of Alabama, v. The West Point Manufacturing Company, The Riverdale Cotton Mills, *et al.*, in the Chancery Court of Alabama, (Rec. pp. 486-500.)

2.—The entire record of the proceedings in the Federal Circuit Court of Georgia, in the case of The Riverdale Cotton Mills v. The Alabama and Georgia Manufacturing Company, of Alabama, and The Huguley Manufacturing Company, of Alabama, complainants in the said Alabama suit, to enjoin them from prosecuting said suit in the Alabama State Court, said record including, as we insist, the answer of the two Respondents to the bill, with exhibits, (Rec. pp. 473-550); and,

3.—The record in the United States Circuit Court of Appeals, and Opinion thereon. (Rec. pp. 550-574, 127 Fed. 497-509.)

4.—As to the record of the former proceedings in the United States Circuit Court for the Northern District of Georgia, in the case of J. J. Robinson, Trustee, v. The Alabama and Georgia Manufacturing Company of Georgia, *et. al.*, (Rec. pp.1-472,) it is respectfully submitted that, while the same was *never offered in evidence* during the progress of the aforementioned causes in either the Alabama State Chancery Court or in the Georgia Circuit Federal Court, yet, the said former record was before the said Federal Circuit Court in Georgia, and properly considered by it on the final hearing, as part of the pleading, as evidence in the records of the court of which it would take judicial notice; and,

it was evidence, only, of the fact that such and such matters were in issue between the parties to *that* cause, that such matters were adjudicated between said parties, and that certain evidence was taken therein. *But*, it was *not* evidence in the suit instituted by The Riverdale Cotton Mills, of the truth of the facts about which evidence had been given by either party, nor was the adjudication binding upon any other person not a party to the said Robinson suit, or holding under such party.

Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co., 174 U. S. 552;
Pardee v. Aldridge, 189 U. S. 429-432, (decided March 16, 1903);
Greenleaf on Evidence, Vol. 1, §§ 522, 523, 538, 539;
Mayfield's Digest of Laws of Alabama, Vol. 3, §§ 1884, 1885, and 1888, and authorities cited thereunder, including: Snodgrass v. Branch Bank of Decatur, 25 Ala. 161.

The material facts, as gathered in these records, are as stated in the first part of this brief, at pages 1, *et seq.*, and will not be repeated here.

II.

THE LEGISLATURE OF THE TWO STATES OF ALABAMA AND GEORGIA DID NOT GREATE THE ALABAMA AND GEORGIA MANUFACTURING COMPANY ONE CORPORATE ENTITY, NOR DOES THAT STATUS ARISE, FROM THE LEGISLATION OF THE TWO STATES, ACCORDING TO THE WEIGHT OF AUTHORITY IN THIS COUNTRY.

It is plain, from what has heretofore been said, that the two corporations, under the name of "The Alabama and Georgia Manufacturing Company," did not, *in fact*, constitute *one* corporation; and, in addition to the authorities heretofore cited, to show they did not, *in law*, constitute *one* corporation, we cite the following:

In "Carter on Jurisdiction of Federal Courts," p. 79, the author quotes approvingly Judge Thayer, of the Eighth Circuit, in the following language:

" Although opposed to a *dictum* of the Supreme Court in " Railroad Co. v. Harris, 12 Wall. 65, it is now well settled " that two States cannot join in creating a single corpora- " tion. This is well expressed by Judge Thayer in a recent " opinion in the Circuit Court of Appeals for the Eighth Cir- " cuit, where it is said: 'At this day it must be regarded as " settled beyond doubt or controversy that *two* States of this " Union *cannot* by their joint action, create a corporation " which will be regarded as a *single* corporate entity, and, " for jurisdictional purposes, a citizen of each State which " joined in creating it. One State may create a corporation " of a given name, and the legislature of an adjoining State " may declare that the same legal entity shall be or become a " corporation of that State as well, and be entitled to exer- " cise within its borders, by the same board of directors and " officers, all of its corporate functions. *Nevertheless*, the re- " sult of such legislation is *not* to create a *single* corporation, " but *two* corporations of the same name, having a different " paternity'."

Mo. Pac. Ry. Co. v. Meeh, 32 U. S. App. 691, 16 C. C. A. 510;

Chicago, etc. R. R. Co. v. The Auditor General, 53 Mich, 79."

And the author adds:

" Certainly the logic of the situation is found in Ohio & " Miss. R. Co. v. Wheeler, (1 Black. 297,) and *not* in the Har- " ris case: in any view of our system of seperate States, it is " opposed to every fundamental principle to imagine such a " co-ordinate legislative act as would result in the creation of " *one* corporate entity."

Whether Judge Thayer be correct or not in speaking of that portion of the opinion in Railroad Co. v. Harris, to which he alludes as *dictum*, it would not affect the result in the case at bar, inasmuch as there has never been any legislation on the part of the States of Alabama and Georgia looking to the *consolidation* of the two corporations known, each as "The Alabama and Georgia Manufacturing Company," nor even the vesting of the same corporate powers in each. It is certain there is nothing in either charter indicating such a purpose, nor having such an effect, and the record discloses no other legislation by either the State of Georgia or Alabama to accomplish that end.

In Grangers Life and Health Insurance Co. v. Kamper, 73 Ala. 325, it was held by the Supreme Court of Alabama, as follows, to-wit:

" A corporation can have no legal existence beyond the " territorial boundaries of the sovereignty by which it is cre- " ated, and it can transact business within the scope of its " powers in other sovereignties only on such terms and con- " ditions as such sovereignties may provide; and whether " only terms and conditions are prescribed, upon which a " foreign corporation is permitted to exercise its powers, " whether there is concurrent action of two or more States " in the creation of a single corporation, or whether a domes- " tic corporation is created, is a question of legislative intent.

" The Grangers Life and Health Insurance Company hav- " ing been incorporated in this State, the legislature of the " State of Mississippi afterwards passed an act, entitled, 'An " Act to authorize the Grangers Life and Health Insurance " Company to create and establish branch departments in " this State,' and providing that such company 'incorporated " by and under the laws of the State of Alabama, be and the " same is hereby authorized and empowered to create and es- " tablish in this State one or more branch departments there- " of, whenever there shall be subscribed to, and paid into said " company, or secured to the satisfaction of the president and " general board of directors thereof, one hundred thousand " dollars as capital stock for such branch department, so cre- " ated and established, the said stock to be subscribed for and " owned by, and the directors of any such branch depart- " ment to be, citizens of the State of Mississippi'; and fur- " ther providing that whenever any such department or de- " partments shall be created and established, the said com- " pany 'shall be regarded as a home company, and shall be " entitled to, and may exercise and employ all the rights and " privileges, immunities and exemptions of life insurance " companies incorporated by the laws of the State of Miss- " issippi,' and making it the duty of the Auditor of said State " on the creation and establishment of any such branch de- " partment, to give to the officers or agents of said company " a certificate 'stating the same, and authorizing it to do " business as a domestic life insurance company of Mississ- " ippi;'

" Held—

" (1.)—That the effect of this act was not merely to license, " or to enable the corporation formed in this State to trans- " act business and exercise its powers in Mississippi, but to " create a corporation having the same name, and like fran- " chises as the corporation formed in this State;

" (2.)—That while there may have been a purpose that of " the domestic corporation thus formed the corporation of " this State should be a constituent, and that some undefined " relations should exist between the two corporations, this " purpose did not change the scope, operation and effect of " the act, but that the two corporations were *distinct legal* " *entities*, and the act of incorporation of each was confined " to the territorial limits of the sovereignty from which it " proceeded."

Notwithstanding the concurrent legislation of the two States, as above stated, the court held not only that two separate, distinct corporations were thereby created, but, further, that *a deed of assignment, executed by the Alabama corporation, vested no title in the assignee to the property in Mississippi.*

It might well be argued that if the concurrent legislation of the two States in respect of this insurance company, notwithstanding the provisions of the statute of Mississippi, recognizing uniformity of purpose and interest in the two companies, created two separate corporations to such an extent that a general assignment, executed by the Alabama corporation, did not pass to the assignee the property in Mississippi, then, the two statutes of Georgia and Alabama, creating the two corporations, known as 'The Alabama and Georgia Manufacturing Company," without any purpose or interest, must have created two separate corporations so entirely distinct as that any mortgage or deed of trust executed by one does not affect the property of the other in a different State; and it is only necessary to add in this connection, that the only mortgage or deed of trust claimed by Petitioner to have been executed, in the case at bar, was executed only by the *Georgia* company, and that *all* of the property embraced in the mortgage is located in *Alabama;* not only located in Alabama, but was all paid for with money subscribed to the capital stock of the *Alabama* corporation, and paid into *its* treasury, and the legal title there and then, vested in *it*, to-wit, The Alabama and Georgia Manufacturing Company *of the State of Alabama, Chambers County.*"—(See Rec. pp. 486-7, 505, and see Statement of Facts, herein, at page 10.)

We quote from the opinion of the Supreme Court of Alabama, as follows:

" Whatever may be the true character of the assignments, " it was inoperative to pass property, rights of property, or " choses in action to which the assignor had no title. If it

" be true, the subscriptions of the appellees were for the " stock of the Mississippi corporation, the notes of the appel- " lees, unless they had been negotiated to the corporation of " *this* State, *did not pass by it.*"

It cannot be successfully contended that the Alabama property, involved in the case at bar, acquired by the *Alabama* Company, with the money paid into its treasury for its *capital stock*, could belong to, or be mortgaged by, the Georgia corporation, unless it could be shown there was a transfer or conveyance by the Alabama corporation to the Georgia corporation, and so far as the record discloses there is not even a pretense of such a transfer or conveyance, and, as matter of fact, there was none.

See also Mo. Pac. Ry. Co. v. Meeh, 16 C. C. A. 510.

Judge Cooley, in Chicago & N. W. Ry. Co. v. Auditor, 53 Mich, p. 91, says:

" It is impossible to conceive of one joint act performed " simultaneously by two sovereign States, which shall bring " a single corporation into being, except, it be by compact or " treaty."

In Quincy Railroad Bridge Co. v. Adams Co., 88 Ill. 615, the court said:

" Two States have no power to unite in passing any legis- " lative act. It is impossible, in the very nature of their or- " ganization that they can so fuse themselves into a single " sovereignty, and, as such, create a body politic which shall " be a corporation of the two States, without being a cor- " poration of each State or of either State."

It is further said in the same case:

" The only possible status of a company acting under char- " ters from two States is that it is an association incorpor- " ated in and by each of the States; and, when acting as a " corporation in either of the States, it acts under the auth- " ority of the charter of the State in which it is then acting, " and that only, the legislation of the other State having no " operation beyond its territorial limit."

III.

LANDS AND PROPERTY IN CONTROVERSY ALL SITUATED WHOLLY WITHIN THE STATE OF ALABAMA.

While it was always a matter of common knowledge, and a fact conceded by the Petitioner itself (Rec. pp. 484, 516-7,) that all that portion of the lands and property in controversy described in the mortgage "as containing sixty-five and 23-100 acres, more or less, * * * including all tenements and improvements, including the cotton mill and machinery therein or thereto belonging," etc., were situated wholly *"in Chambers County, State of Alabama,"* (Rec. pp 5-6, 488, 490-1, 498-9, and 507,) on the other hand, up to the filing of the suit by the said two Alabama corporations in the Chancery State Court of Alabama, against the Petitioner and others, the impression had obtained for years, that the other portion of the said lands, consisting only of certain detached and isolated islands, opposite to the factory plant and village proper, were as also described in said mortgage, situate "in the 20th District of Harris County, Georgia."

But, an investigation of the official maps of survey and the accompanying field notes (made in 1829-1834, when the State of Georgia ceded to the United States all that territory west of the Chattahoochee river, out of which Alabama was carved), on file in the Government General Land Office at Washington, D. C., (Rec. p. 507,) and also in the office of the Secretary of State of Alabama, at Montgomery, Ala., (Rec. pp. 490-1,) all duly certified and in evidence at pp. 498-9 of this record, developed that even those said islands were, in fact, actually situated in the state of *Alabama.* This was due to the fact that the said so-called islands, and described as such in the said mortgage, originally did not exist at all, (not appearing on the large map of survey of the Chattahoochee river in the Land Office at Washington, *supra,*) but were formed *artificially,* in the manner fully explained at pages 490-1 of the Record in this cause; and, after being so artificially created, said islands really did not lie in the bed of the *main* stream of the Chattahoochee river, but between the latter and a certain tributary leading thereto and flowing from the Alabama, or western, side, the intervening land falling within the jurisdiction of *Alabama.* (See the evidence as fully set out in the Record at the pages above cited.)

"Courts judicially know the location of the various townships and ranges of the Government survey of the lands in the State."

Mayfield's Digest of Laws of Alabama, Vol. 3, p. 442, citing Webb v. Mullins, 78 Ala. 115.

"Courts will take judicial notice of public surveys, maps, and plats of public lands, the location and relative position of such lands so surveyed, mapped," etc.

Mayfield's Digest of Laws of Alabama, Vol. 3, p. 442, citing Knabe v. Burden, 88 Ala. 440 (7 So. 92);
Chambers v. Ringstaff, 69 Ala. 140;
Schoen v. Kelly, 112 Ala. 323 (26 So. 4).

"And judicial notice is conclusive."
Schollenberger v. Pennsylvania, 171 U. S. 1;
17 Ency. Law (2d ed.), 911, note 2.

In this connection, the attention of the court is respectfully invited to the following evidence on the face of the record in this cause:

(a)—In the answer to the bill,

" Respondents deny that said property (described as being) in " Alabama and in Georgia, are parts of an '*indivisible*' whole. " On the contrary, they aver that the island described in " said mortgage as 'All of a large island in the Chattahoo- " chee river, designated as Island No. Six (6,) containing " one hundred and forty-three acres, more or less, *is not* " necessary to or used in connection with the operation of " said manufacturing plant, but has long been rented from " year to year for *agricultural* purposes." (Rec. p. 508.)

As matter of fact, barring this one island, representing not *one per cent.* of the value of the entire property at issue, the other two islands are low, marshy lands, and utterly valueless.

(b)—Under Sections II and VI of the charter creating the Georgia Company, it and its successors are expressly inhibited in terms from interfering with or disturbing the vested rights of other persons in said *islands*, specifically described as *"contiguous to"* possible acquisitions in Georgia.

(c)—And lastly, that wherever situate, the evidence shows that the title in and to all the lands in controversy (including *islands*,) was vested solely in the pre-existing *Alabama* corporation. (Rec. pp. 486-7, 505, and see p. 530.)

IV.

THE DECREE OF FORECLOSURE, RENDERED BY THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, BEING *IN REM*, ONLY, AND NOT ACCOMPANIED OR FOLLOWED BY THE REQUIREMENT OF A CONVEYANCE FROM THE OWNER OF THE LEGAL TITLE, OR MORTGAGOR CORPORATION, OR THE TRUSTEES, DID NOT OPERATE TO CONVEY ANY TITLE TO THE MORTGAGED LANDS OR PROPERTY, LOCATED IN THE STATE OF ALABAMA.

This branch of the argument is so completely covered in the brief of associate counsel, Mr. Erwin, that we will confine our argument here, in the main, to meeting contention of opposing counsel and their reliance upon the effectiveness of the decree *in rem* against the *Georgia* corporation of The Alabama and Georgia Manufacturing Company, such as was rendered in the case at bar; and incidentally, we shall undertake to differentiate between the case of "*Muller v. Dows*," 94 U. S. 444,—the only authority on which counsel for Petitioner seem to rely—and the case at bar, and shall point out the many material and vital facts in favor of the latter that do not enter into or characterize the said "*Muller v. Dows*" case.

In Railroad Company v. Swasey, 23 Wall. 411, touching upon the "Forms and Terms of a Decree," this court declared, that "Circuit Courts should exercise care in preparation of decrees in foreclosure suits."

And, in this connection, we note preliminarily, that, in the recent case of Julian v. Central Trust Company, 193 U. S. 93, (decided Feb. 23, 1904,) this court, at page 101, takes occasion to quote approvingly the text of what it holds to be the proper form and terms of a decree in equity.

A glance at this latter decree, as contrasted with the divers decrees of sale and of confirmation entered in the case at bar, namely, of March 30, 1895, (Rec. pp. 356, 359-362,) of June 25, 1896, (Rec. pp. 395-6,) and of Oct. 15, 1898, (Rec. pp. 445-7,) quoted (in part,) in the first branch of our statement of the case, at pages 4, 5, of this brief, will show how far the said "forms and terms" of the decrees as entered in the case at bar, fail and fall short of measuring up to the standard that was approved by this court in the Julian case, *supra*.

DIFFERENTIATING BETWEEN "MULLER V. DOWS" AND THE CASE AT BAR.

In distinguishing between these two cases, *supra*, we shall endeavor to accomplish this the more clearly and satisfactorily, by placing in juxta-position, on the one hand, first, the facts characterizing the case of Muller v. Dows, as made to appear in the statement of the case by Mr. Justice Strong, and on the other hand, the salient facts characterizing the case at bar, following *seriatim* immediately after the former, in their order.

1.—In *that* case,—(The Muller v. Dows)—a suit was brought in the Circuit Court of the United States for the District of Iowa, by citizens of Missouri and New York, against *two* corporations, alleged to be *Iowa* corporations. It appears that one of the defendant corporations, the Chicago & Southwestern Railway Company, was formed by the *consolidation* of *two* corporations of the same name, chartered under the laws of Missouri and Iowa respectively, and *consolidated* under the authority of the laws of each State, which provided that such railroads were authorized to "merge and consolidate the stock of the respective companies, making *one* joint stock company of the railroads thus connected." (Judge Strong, *supra.*)

On the other hand, in the case at bar, there never has been a *consolidation* of the original Alabama company with the later Georgia company, of the same name, and, further, the Circuit Court in Georgia, never had or could have had jurisdiction of the *Alabama* corporation in the said Robinson suit.

2.—This was an action to foreclose a mortgage given by this *consolidated* company upon its line of railroad, *"which crossed the State line and was within two States."* That is to say, a part of which was within the State over which the court had jurisdiction (Iowa,) but a part of the line *extended into another* State (Missouri.)

In case at bar, this was an action to foreclose a mortgage given by the original *Alabama* company, namely, "The Alabama and Georgia Manufacturing Company *of the State of Alabama, Chambers County,"* which, as sole owner of the title, was the only possible valid mortgagor. Said mort-

gage covered a manufacturing plant situate wholly in *Alabama,*—not one "which crossed the State line and was within *two* States." That is to say, *no* part of it was within the jurisdiction of the Circuit Court in Georgia.

3.—The entire line was "subject to one mortgage," and covered by one trust deed.

In case at bar, while the entire property was likewise "subject to one mortgage," and covered by one trust deed, that mortgage was not executed by any *consolidated* company, but solely by the *single* Alabama company, and covered property wholly in Alabama.

4.—Said trust deed "included the *franchises* of the company, which made the mortgage, said franchises being incapable of *division.*"

In case at bar, while the said trust deed "included the *franchises* of the company which made the mortgage," to-wit, the original Alabama company, all the rights, title and interest vested under the franchise of said Alabama Company, which embraced all the property in controversy, *per contra, were* capable of *division,* and completely separate from those claimed by Petitioner on behalf of the said Georgia Company of same name. And this, because, said Georgia Company, by the terms of the charter creating it, *could not* own any lands or erect any buildings except on the *East* (or Georgia) side of the river, and *did not* acquire any such lands or construct any such buildings, in Georgia.

5.—"The *Mortgagors* here were within the jurisdiction of the court."

In case at bar, the *Mortgagor* here,—to-wit, The *Alabama* Company,—was *not* within the jurisdiction of the Circuit Court of Georgia.

6.—"So were the Trustees of the mortgage. It was at the instance of the *latter* (Trustees) that the *master* was ordered to make the sale."

In case at bar, it was *not* at the instance of the Trustees that the *"Commissioner"* was ordered to make the sale in issue, but rather by force of the decree of the court proceeding *in rem.* Or, as described in the opinion of the Circuit Judge:

"The case has really more the appearance of the *holders* of these obligations proceeding through the Trustee, as a *mere nominal party,* than the act of the Trustee, in the discharge of the duty incumbent upon him by virtue of a trust which he had assumed and agreed to carry out, (Rec. p. 129.)" Whereas, in the *Muller v. Dows* case, "the title in *that* case, was transferred by the courts compelling the execution of a *power of sale,* and not by force of the *decree.*"

7.—"The *'Mortgagors'* who were foreclosed, were enjoined against claiming the property after the Master's sale, and *directed to make a deed in further assurance.*"

In case at bar, the real and only possible *valid 'Mortgagor,'* to-wit, the *Alabama Company,* was never foreclosed at all, in fact or in law, it never having been made party defendant in any suit whatever.

And certainly, neither *it,* the *Alabama* Company, or the owner of the equity of redemption or its assignee, or the trustees, or anybody else, either or all, were ever "*directed to make deed in further assurance.*" Indeed, even in respect of the *Georgia* Companies, only, so made parties, it is noteworthy that the said Circuit Court, to use the language of Mr. Justice Holmes in Pardee v. Aldridge, 189 U. S. 429-432, never essayed to "*work out its decrees by orders to the defendants.*"

On the contrary, the prayer in the original bill asked for a foreclosure *in rem,* against the *Georgia* corporation of The Alabama and Georgia Manufacturing Company, and *it* only, (which did not and could not own the property mortgaged,) and there was no decree *in personam* against *anybody,* whether a person or corporation of Alabama, or of Georgia, or of Missouri—only the decree *in rem* against the sole defendant therein, the said *Georgia* Company, (Rec. pp. 3, 356-362, 395-6, 445-7, and p. 488.)

So much for the more material points characterizing the two said cases, so far as they can be paralleled. But, in addition, and as further cumulative in favor of the case at bar, the following new and independent features should be noted as obtaining in the latter which are not at all found in the *Muller v. Dows* case. We cite only the more striking features of disparity, the Assignments of Error pointing out, (Rec. pp. 542-6,) and the brief of associate counsel, Mr. Erwin, emphasizing many others.

1.—(a) The subject matter of the controversy (in case at bar) lies beyond the limits of the District Federal Court in Georgia, and where the process of that court cannot reach the *locus in quo;*

(b) Moreover, the rights of the *mortgagor* and *sole owner* of the property mortgaged, to-wit, The Alabama and Georgia Manufacturing Company of *Alabama,"* and of The Huguley Manufacturing Company of *Alabama,* were seriously involved in the controversy, and *they* were not made parties to the Robinson suit. Whereas, if so joined, the jurisdiction of said court would have been necessarily ousted, as they are corporations of Alabama, and as co-defendants, would be citizens of the same State as the plaintiff (Robinson.) *But,* they must be joined in the suit as their interests are heavily involved."

[Paraphrasing the familiar case of Northern Indiana R. Co. v. Mich. Central R. Co., 15 How. 233, holding, under such statement of facts as stated *supra,* "The Circuit Court had *no* jurisdiction of the case."]

2.—The charter of the *Georgia* corporation of The Alabama and Georgia Manufacturing Company, which was granted by Act of the General Assembly of Georgia, of March 21, 1866, *expired by statutory limitation* in thirty years from its date, to-wit, on March 21, 1896, and the corporation then *died.* (Act of Jan. 1, 1863; Code of Georgia, 1895, § 1851; 49 Ga. 151; 54 Ga. 404; 87 Ga. 533.)

Notwithstanding this, without making *new* parties, and without the appointment of a *receiver,* pursuant to the Code, (1895,) p. 32, § 1886, (Acts, 1855-6, p. 226, § 1975,)—the property was offered for sale May 6, 1896, (Rec. p. 390,) and a *conditional* decree of confirmation entered June 25, 1896, (Rec. pp. 395-6,) but no compliance meantime having been made, eventually, to-wit, as late as Oct. 15, 1898, another decree was passed—also *conditional* upon events *to be* performed *in futuro,* (Rec. pp. 442-4, 445-7.)

"Of course, a corporation *cannot* take or make a conveyance of property *after* its dissolution."

Clark & Marshall, Vol. 2, citing Bradley v. Reppell, 133 Mo. 545; 54 Am. St. Rep. 685; see also, to same effect:

May v. State Bank of North Carolina, 2 Rob. (Va.), 40 Am. Dec. 726;

Pendleton v. Russell, 144 U. S. 645;

Moultrie v. Smiley, 16 Ga. 303;
Selma (Ala.) National Bank v. Colby, 21 Wall. 609;
Nelson v. Hubbard, 96 Ala. 238.

3.—In case at bar, there is no evidence that the terms were ever complied with and the sale completed, or that any deed ever was made to Petitioner—even by the Commissioner, on behalf of said *dead Georgia* corporation, (assuming latter had any property to be conveyed.)

" It is the *deed* made to the purchaser actually transfer-
" ring the title of the parties to the suit, that terminates
" the mortgagor's equity of redemption."

Chicago, etc., R. R. Co. v. Fosdick, 106 U. S. 71;
Brine v. Ins. Co., 96 U. S. 627;
Williamson v. Berry, 8 How. 495-6;
Curtis v. Millard, 14 Iowa, 129-130; 58 Iowa, 133;
Daniels Ch. Pr., § 1265; and cases cited.

Having thus first differentiated between the two cases in point with respect of the *facts* characterizing each in contradistinction to the other, we will address ourselves to the legal principles applicable thereto, and by quoting briefly from the opinion in said cause of Muller v. Dows itself, and from other decisions of this court and those on the Circuit, demonstrate that the said adjudication in Muller v. Dows is not only *not* against the contention assumed by these Respondents, but, to the contrary, is *for* us, and in harmony with all the other adjudications had in the Supreme Court, and those delivered in the other courts, both Federal and State:

Mr. Justice Strong, after reciting the foregoing facts as found in the case of Muller v. Dows, substantially reproduced hereinabove, said:

" 1.—With these laws in force the *consolidation* of the
" Chicago & Southwestern Railway was effected. The *two*
" companies became *one*. But in the State of Iowa, that
" *one* was an *Iowa* corporation, existing under the laws of
" that State alone." (P. 447.)

It was further held that while for the purpose of Federal Court jurisdiction, that *one* corporation was to be treated as

a citizen of Iowa, when sued in Iowa, that nevertheless the Circuit Court of Iowa had complete jurisdiction of the *person* of that *'one'* corporation, even in respect to rights of property held in other States. The court says:

" 2.—It is here undoubtedly a recognized doctrine that a " court of equity sitting in a state, and *having jurisdiction* " *of the person,* may decree a conveyance *by him* of land in " another State, and may enforce the decree by process " against the defendant. True, *it cannot send its process in-* " *to that other State, nor can it deliver possession of land in* " *another jurisdiction,* but it can command and enforce a " transfer of the title. And there *seems* to be no reason why " it cannot, in a *proper* case, effect the transfer by the " agency of the *Trustees,* when they are complainants," " * * * (summing up.)

" And the court can direct the *Trustees* to make a deed " to the purchaser *in confirmation of the sale.* We cannot " therefore, declare void the decree which was made." (pp. " 449-450.)

In that case, it will be observed, there was no effort to acquire jurisdiction over a corporation of *another* State by *ancillary* proceedings, or otherwise, but by reason of *consolidation,* there being but the *one* corporation, and the court *having complete jurisdiction* over the *person of that one,* the sole question was whether it could, under a trust deed, decree a sale of the railroads in *both* States and compel a conveyance.

In Lynde v. Columbus C. & I. Ry. Co., 57 Fed. 993, it is held as follows:

" In the foreclosure of a mortgage on a railroad situated " partly in *two* States, a court of one State *cannot* merge in- " to its judgment the lien on the property in the other State, " and, while it may act upon the *person* of the defendant, so " as to compel *it* to make conveyances or releases, yet, *if it* " *has not done so,* its mere judgment is *not a bar* to suit in " the other State, between the *same* parties, to foreclose the " same mortgage there." (Head note, 2.)

And, in the opinion of the court, this language was used:

" In Watkins v. Holman, 16 Peters, 25, it was held, that a

" court of chancery might decree a conveyance of land in any " other State, and might enforce the decree by process against " the defendant, but that *neither the decree itself, nor any " conveyance under it, except by the person in whom the title " is vested, could operate beyond the jurisdiction of the " court,*" (adding): "Indeed, no principle is more firmly set- " tled than that the disposition of real estate, whether by " deed, descent, or any other mode, must be governed by the " laws of the State where the land is situated."

And to the foregoing proposition, *supra*, the court cites:

Farmers L. & T. Co. v. Postal Tel. Co., 55 Conn., 334, 11 Atl. Rep. 184; and

Muller v. Dows, 94 U. S. 444.

And apropos of the latter, the court proceeds as follows:

" It is *argued* that, in respect of *immovable* property, mort- " gaged by an *interstate* railroad company, a *different* rule " has been established by the case of *Muller v. Dows*, 94 U. S. " 444. It is contended that the court there held, that as the " railroad and its franchises were an entirety, any court *hav- " ing jurisdiction of the parties and subject matter*, could " make a valid decree of foreclosure, which would operate on " the entire railroad property, as well without as within the " State where the decree was pronounced, and that it would " completely merge the lien of the mortgage.

" What was *there* said, giving *apparent* support to this " contention, was merely *'arguendo,'* and was *not essential* " to the judgment pronounced.

" In that case, the Circuit Court of the United States for " the District of Iowa, passed a decree of foreclosure and " sale of a railroad extending from a point in Iowa to a " point in Missouri, and owned by a corporation formed by " the *consolidation* of a corporation of Missouri with a cor- " poration of Iowa. The entire line was covered by one " trust deed, and the suit to foreclose was brought by the " Trustees. The mortgagors were also before the court, and " the sale was made by the Master at the instance of the " Trustee. It was held that the decree was not void, *so far* " as it directed the foreclosure and sale of that *part* of the " railroad lying in *Missouri*, and that the Trustee could be " required by the court in Iowa to make a deed to the pur- " chaser *in confirmation* of the sale.

" In my judgment, this case does not overturn the well-es- " tablished doctrine, that a court in *one* State *cannot pass a " decree which shall operate to change the title to, or merge a " lien upon, immovable property in another State.* The title

" in *that* case was transferred by the court compelling the " execution of *a power of sale*, and *not* by force of the *decree;*

Mercantile T. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337;

Farmers L. & T. Co. v. Postal Tel. Co., 55 Conn., 334, 11 Atl. Rep. 184."

After quoting the latter case and commenting *in extenso*, the court concludes:

" In my judgment, the doctrine of *this* case presents the " *better* view, and it must be held that the *decree* of the Ohio " court did *not* merge the lien of the mortgage on the real es- " tate in Indiana."

In Pittsburg & State Line Ry. Co. v. Rothschild, 26 Amer. & Eng. Railway Cases, p. 50, (Advanced Case, Penn. 1886,) it is held as follows:

" It is clear that the decree of sale, and the deed made in " pursuance of it (in *New York,*) *are ineffective to pass title* " *of the property in Pennsylvania.* * * *.

" Though a person *having the legal title* to land in one " State, may be decreed by a court of equity in another State " to convey the land, yet, *neither* the *decree* nor any con- " veyance by virtue of *it* by one *not having the title* can ope- " rate *beyond* the jurisdiction of the court.

Watkins v. Holman, 16 Peters, 25.

" A court of chancery, having jurisdiction over the *per-* " *son who has the legal title* to lands in another State, may, " by a decree, force *him* to convey to the holder of the equit- " able title for whom he stands as trustee; *but it cannot, by* " *its decree, or through a deed of a commissioner, pass that* " *title.*"

Watts v. Waddle, 6 Peters, 389.

And the court sums up its conclusion in these strong words:

" That the proceedings had in the Supreme Court of Mon- " roe County, New York, for the foreclosure of the mortgage, " were *local* in their character and can have *no extra-terri-* " *torial effect:* (H. N. 3);

" That the decree of sale and deed made, in pursuance of " it, *are ineffective to pass title* of the corporate property in

" Pennsylvania to Adrian Iselin, the purchaser, *or his ven-*
" *dee," etc.;* (H. N. 4);
" That the decree foreclosing the equity of redemption of
" the mortgagor had *only* the effect of foreclosing its equity
" of redemption in the mortgaged premises in the State of
" New York." (H. N. 5.)

And in concluding its opinion in this case, the court declares:

" *These* principles are *not in conflict* with the principles
" decided in *Muller v. Dows,* (94 U. S. 444.)"

John D. Works, the author of "Courts and Their Jurisdiction," after an interesting review of the principles and precedents bearing upon this question, summed up in the following words:

" *But,* whether the court can go further and enforce a con-
" veyance is still more doubtful. To allow such a power is
" to concede to the courts of one State the jurisdiction to
" render a decree, and enforce a conveyance which would
" pass title to real estate outside of its territorial jurisdic-
" tion. And yet, *some* of the cases go to that extent."
Muller v. Dows, 94 U. S. 449;
Seixas v. King, 39 La. Ann. 510; 2 So. Rep. 416.

And in the note to the text, at pages 54-5, these remarks are volunteered, by way of distinguishing the said Muller v. Dows case, *supra,* which are in line with those preceding:

" The case of *Muller v. Dows,* was an action to foreclose a
" mortgage given by a railroad company upon its line of
" railroad, a *part* of which was within the State over which
" the court had jurisdiction, but a *part* of the line extended
" into *another* State. The mortgage covered the entire line.
" It was held that the court had jurisdiction to foreclose the
" mortgage as to the entire line, and to order the sale of the
" property as an entirety. *But,* in passing upon this ques-
" tion, the court said: 'Without reference to the English
" Chancery decisions, where this objection to the decree
" would be quite untenable, we think the power of courts of
" chancery in this country is sufficient to authorize such a
" decree as was here made. It is here undoubtedly a recog-

" nized doctrine that a court of equity sitting in a State, and " having jurisdiction of the *person*, may decree a conveyance " by *him* of land in another State, and may enforce the de- " cree by process against the defendant. True, it *cannot* send " its process into that other State, nor can it deliver pos- " session of land in another jurisdiction, but it can command " and enforce a transfer of the title. And there seems to be " no reason why it cannot, in a *proper* case, effect the trans- " fer by the agency of the Trustees when they are complain- " ants'."

And these comments follow:

" With respect to so much of this opinion as relates to the " matter of enforcing contracts to convey, it must be regard- " ed as the *'reasoning'* of the court rather than an *authorita- " tive decision*, as *no such question was before the court.* " The case of Seixas v. King is directly in point, and is based " upon the case of *Muller v. Dows.*"

After pointing out that the Supreme Court of Ohio has taken a different view of the matter, citing and quoting "Burnley v. Stevenson, 24 Ohio St. 474, 478, 15 Am. Rep. 521, the author concludes as follows:

" *It does not follow*, however, that a court having power to " compel the parties before it to convey lands situated in an- " other State, *may make its own decree to operate as such " conveyance.* Indeed, it is well settled that the *decree* of " such court *cannot* operate to transfer title to land situate " in a foreign jurisdiction. * * * And if a *decree* in such " case cannot effect the transfer of title to such lands, *it is " clear that a deed executed by a Master, under the direction " of the court, can have no greater effect.*"

Watts v. Waddle, 6 Peters, 389:
Page v. McKee, 3 W. P. D. Bush, 135."

That the principle laid down in *Muller v. Dows*, is not inharmonious to all the other adjudications by this court, and by those in the other courts quoted, *supra*, and is really *for* us and not *against* us, according to the views of the editor of the "Digest of the United States Supreme Court Reports," Vol. 2, p. 1365, anent the subject of "Real Property—Transfer by Courts," we subjoin an extract therefrom, to the following effect:

" A court *cannot*, by the mere force of its *decree*, transfer " the title to land lying without its jurisdiction from the " party in which it was vested. It may decree a conveyance " and enforce its execution by process against the party; " but neither its *decree* nor any conveyance under it, *ex-* " *cept by the party in whom the title is vested*, is of any effi- " cacy beyond the jurisdiction of the court, (citing):

Corbett v. Nutt, 10 Wall. 464, 19;; 976;
Watts v. Waddle, 6 Pet. 369, 8; 437;
Watkins v. Holman, 16 Pet. 25, 10; 873; and including *Muller v. Dows*, 94 U. S. 444, 24; 207.

In Watts v. Waddle, *supra*, 1 McLean, 200, it is held as follows:

" The decree of title in one State to lands in another *can-* " *not operate to vest the legal title.*
" The statute which gives effect to a deed executed with- " out the State, if made in pursuance of the law of the coun- " try, refers to deeds of *the party.*
" A decree in Kentucky for the conveyance of land in " Ohio, *though executed by a Commissioner*, under the stat- " ute in pursuance of the decree, *can give no title*," (adding): " These defects in the deed tendered are so *radical*, as to " render it as a legal conveyance, *inoperative.* And on *this* " ground, the bill of the complainants must *be dismissed* " *with costs.*"

In Mercantile Trust Co. v. Kanawha & O. Ry. Co., 39 Fed. 339, the court, speaking through Mr. Justice Harlan, said:

" " It was assumed by counsel that a determination of this " question adversely to the plaintiff would be a repudiation " of the decision in Muller v. Dows, 94 U. S. 444.
" *But such is not the fact.*

And the opinion goes on to differentiate the salient features characterizing each case, which ground need not be here repeated, as this case is cited and quoted further on in this brief to our proposition "VI."

The Supreme Court of Georgia, in 94 Ga. 307, in an opinion reviewing the decree of the lower court upon the fore-

closure and sale of the property of the Georgia Southern & Florida Railroad, took occasion to discuss *Muller v. Dows*, holding that upon authority of it, "the Superior Court of *mortgagor's* residence may decree foreclosure sale of a railroad continuing into another State, directing *receiver, mortgagee, and mortgagor* to execute deed to whole property." *But*, it was at pains to stress, as the condition precedent, the recognized importance of strict observance of the conditions there detailed.

Some Home Examples from the Circuit Court of Appeals for the Fifth Circuit, and from the Circuit Court for Northern District of Georgia, as Pertinent Precedents for Respondents' Contention.

When the learned Circuit Judge (Pardee,) in the course of his dissenting opinion, concluded by announcing, "There are some *other questions* raised in the assignments of error the proper determination of which might require the *reversal* of the decree below, and a remand for further proceedings," etc., (Rec. p. 564, 127 Fed. 508,) he must have had in mind, among other assignments set out, our "Eleventh" and "Fifteenth" Assignments, (Rec. pp. 545-6,) in particular, and must have been weighing them in the light of the adjudication in his own court *in re* "Guarantee Trust & Safe Deposit Co. v. Delta & Pine Land Co. *et al.*, 104 Fed. 5, (decided May 30, 1900.) As such a *reversal* of the Circuit Court, upon the independent grounds so assigned, would be but consistently maintaining that uniformity of decisions both of this court and his own, for which counsel of Petitioner claims to be concerned, we may be pardoned for closing this branch of our argument by subjoining certain pertinent extracts from this opinion of the Circuit Court of Appeals for Fifth Circuit, which was unanimous, and in the strongest terms sustains the contention of Respondents:

Without quoting the text of the opinion covering an exhaustive review of many of the authorities cited and quoted hereinabove, we extract the following:

" And it may be said that 'a sale made by a *special master*,
" under the direction of a court of chancery, *is not* a sale
" made by either of the *parties* to the litigation or under his
" direction. The master is a representative of the *court*, as

" a marshal or sheriff is in an action at law. He is not
" under the control of either party. He is not the agent of
" either to make the sales. (Mining Co. v. Mason, 145 U. S.
" 361, 362.) It will thus be seen that the decree in Black-
" burn v. Railroad Co. (C. C.), 3 Fed. 689,) did not operate
" directly upon the trustees or the railroad company, by re-
" quiring conveyances to be made by *them*, but partaking of
" the nature of a proceeding *in rem*, it acted immediately
" upon the *property*, and was to be executed through the in-
" strumentality of independent officers appointed by the
" court. A writ of assistance, issued by the court in Ten-
" nessee to put the purchaser at the sale made by the mas-
" ter in possession of the property, *would be wholly inope-*
" *rative, because such process could have no extra-territorial*
" *effect.*" (Citing):

Toland v. Sprague, 12 Pet. 300; 9 L. ed. 1093;
Picquet v. Swan, 5 Mason, 40 Fed. Cas. No. 11,134;
Ex parte Graham, 3 Wash. C. C. 456; Fed. Cas. 5,667;
and other cases cited."

" Notwithstanding the want of power in a court of one
" State to deliver by its process the possession of land in an-
" other, it is nevertheless a recognized and accepted doc-
" trine that a court of equity, sitting in a State and having
" jurisdiction of the *person*, may decree a conveyance *by*
" *him* of land in another State, and may enforce the decree
" by process against the defendant."

Muller v. Dows, 94 U. S. 449, 24 L. ed. 207;
Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181, etc.

" Where, however, it is sought by the *decree* to effect a
" transfer of the title to land lying within another jurisdic-
" tion, by directing its sale by a *Master*, who is *not* clothed
" with the title, the decree in such case operates upon the
" *thing*, and does *not* divest the title of the *Owner;* the
" master being, as we have seen, a mere representative of the
" court, not under the control of either party, nor the agent
" of either to make the sale. In the case last mentioned, the
" deed is simply *inoperative* to pass the title; for, to judici-
" ally divest the title to real estate out of one person and
" place it in another, *the holder of the title* must be before
" the court, and the decree must operate upon the *person* by
" requiring *him* to make the conveyance. This principle is
" *elementary*, and should have special application to decrees
" rendered by the courts of one State authorizing the trans-

" fer of title to lands lying within the limits of another " State." (104 Fed. p. 10.)

" *But,* it is claimed by counsel for the appellant, that *Muller v. Dows,* 94 U. S. 444, 24 L. ed. 207, has overruled or modified the earlier cases decided by the Supreme Court.
" *..In this view we are unable to concur.*
" The suit in that case was brought by the trustees named " in the mortgage. The Chicago & Southwestern Railway " Company was one of the defendants. A *part* of its rail- " road was in Missouri, and the mortgage which the bill " sought to have foreclosed covered that part as well as the " entire property covered by the mortgage, and directed the " *Master,* who was ordered to make the sale, to execute a " deed to the purchaser. *The Mortgagor was also directed* " *to make a conveyance to the purchaser in further assur-* " *ance.*
" Upon appeal the decree was affirmed.
" It will be observed, that the railway extending into *two* " States, was sold in its entirety; that the trustees were com- " plainants in the suit seeking a sale of the property; and " that the *Mortgagor* was required also to execute a deed " to the purchaser. The court seemed to lay stress upon the " fact that the sale was made *at the instance of the trustees,* " who notwithstanding the appeal, could also be directed by " the trial court to *join in* a conveyance.
" In discussing the question, the court (at p. 450, 94 U. S. " and p. 209, 24 L. ed.), observed:
" 'The *Mortgagors* here were within the jurisdiction of the " court. So were the Trustees of the mortgage. It was at " the instance of the latter, the master was ordered to make " the sale. The court might have ordered the trustees to make " it. The *Mortgagors,* who were foreclosed, were enjoined " against claiming property after the master's sale, *and di-* " *rected to make a deed in further assurance,* and the court " can direct the trustees to make a deed to the purchaser *in* " *confirmation* of the sale. We cannot, therefore, declare " void the decree which was made."

Thus, the Circuit Court of Appeals for the Fifth Circuit, after its exhaustive review of the uniform adjudications of this court to the proposition (IV) advanced *supra* by Respondents, distinctly and unanimously *declined to concur in* the contention of counsel in that case—and as urged by counsel in this case — to the effect that the said *Muller v. Dows* case has "overruled or modified the earlier cases decided by the Supreme Court," but expressly held to the *contrary.*

And the former adjudication of the said Circuit Court of Appeals for the Fifth Circuit, in the case of "International Bridge, etc. Co. v. Holland Trust Co., 52 U. S. App. 240-3," (decided May 18, 1897,) wherein, upon the authority of Muller v. Dows, 94 U. S. 444, the sale of an interstate bridge was upheld by Pardee and McCormick, Circuit Judges, and Newman, District Judge, is merely in harmony with the said contention urged by Respondents. This, for the reason among others, that said adjudication was pursuant to a decree *in personam*, and not *in rem*, and all the parties at interest, including the owner and mortgagor, were before the court, "and the *bridge company, its officers and directors*, were ordered, after the sale of the property and the confirmation of the sale, to make good and sufficient conveyances * * * and failing to do so, * * * they would be held to be in contempt of court, and would be punished accordingly."

Respecting the matter of "home precedents," or examples, it is noteworthy that, in the framing of the "form and terms" of the divers decrees of sale and of (conditional) confirmations, as entered by the Circuit Court in the case at bar, the *latter* appear to present the *only exception* or departure from the general rules established under the many and important adjudications heretofore had in the said court, both those preceding and those subsequent thereto.

In all railroad foreclosures recently had in the jurisdiction of the Circuit Court of the United States for the *Northern District of Georgia, ancillary* bills were filed in *every State* through which the road ran; decrees were taken on each of these ancillary bills, and *the mortgagor railroad companies were required to execute deeds*, as well as the Master Commissioner, and the purchaser was given the right to demand a deed from the *trustee* foreclosing the mortgage.

This was true in the Central Railroad foreclosure, Richmand and Danville foreclosure, Georgia Pacific foreclosure, Savannah and Western foreclosure, Marietta and North Georgia foreclosure, and Chattanooga, Rome and Columbus foreclosure, and notably in the case of the Eagle and Phenix Manufacturing Company foreclosure.

The course pursued in respect of the foreclosure and sale of the property of the said Eagle and Phenix Manufacturing Company, one of those subsequent in date to that of the case at bar (in 1898-9,) affords a particularly striking home example of the "forms and terms" that were *not* observed in

the case at bar. The Eagle and Phenix Mills represented a two million dollar cotton mill plant situate just twenty miles south of the plant in controversy, on the Chattahoochee river, the bulk of its property, consisting of mills, machinery, etc., being on the *East* or *Georgia* side of the river, while a smaller portion, such as the operative houses, and other realty and a small yarn mill, (all of far less intrinsic value) are on the west or Alabama side, in Girard, Ala. Furthermore, the said Eagle and Phenix Manufacturing Company was chartered only under the laws of *Georgia,* and it was the *only* party defendant in foreclosure.

And yet, in order to reach and subject the said *Georgia* Company's lands and property in Alabama, and to effectuate a valid sale and conveyance thereof, each and every form and ceremony hereinabove outlined were duly observed not only by the said Judge of the Georgia Circuit Court (Newman, J.), in *his* jurisdiction, but likewise duplicated under the ancillary or auxiliary suit in the Middle District of Alabama, concurrently prosecuted therein, each of said courts independently entering its respective decrees, and *requiring* as conditions precedent to delivery of deed and *before* surrender by the Receivers, *first,* evidence of completed payment of the entire amount bid, and immediately on confirmation, that *then, the defendant corporation owner and mortgagor, and Trustee,* should "execute and deliver, *under the direction of* the Master Commissioner, conveyances by way of confirmation, and further assurance of title," etc. (Book of Minutes, U. S. Cir. Ct., Mid. Dist. Ala., Vol. 12, pp. 274, 277, 260-292.)

V.

REPLY TO THE DISSENTING OPINION OF JUDGE PARDEE, IN THE CASE AT BAR.

It is with great respect we discuss the dissenting opinion of the learned judge of the Circuit Court of Appeals, and endeavor to show that it is based upon erroneous principles, or at most supported rather by the *argumentum ad hominem,* than by sound logic.

His views, that if Respondents' contention is correct that there are *two* distinct corporate entities under the name of "The Alabama and Georgia Manufacturing Company," then they are 'twins,' assimilated to the celebrated Siamese Twins, who were bound together by a common ligament so that

where one went the other was bound to go,—is more imaginative than real.

Notwithstanding the vast resources of Nature, she was enabled to accomplish such a result only by a *freak;* a complete departure from the normal type, and no power but Nature, herself, could have wrought such a work.

In respect of the so-called "Corporate Twins," the authorities we have cited clearly show that the learned dissenting judge is in error in supposing that unity of corporators, stockholders, officers, property and business (even if those conditions actually obtained,) furnished a ligament that binds these two corporations together so that whatever one did, the other did, and wherever one went the other went.

These authorities make it quite clear that notwithstanding such unity there are *two separate* corporations, citizens of different States, and that it was beyond the power of the two corporations by anything they might jointly do, and beyond the power of the two States, to convert the two corporate beings into one complete, independent legal entity.

St. Louis & San Francisco Ry. Co. v. James, 161 U. S. 545;

Kahl v. Memphis & Charleston R. R. Co., 95 Ala. 337;

Meyer v. Johnston & Stewart, 64 Ala. 603, 669;

Carter on "Jurisdiction of Federal Courts," pp. 79, 80, 81, 82, 83, 84, 85;

Also, Majority Opinion of the Circuit Court of Appeals, (Rec. pp. 551, 559-560, 127 Fed. 504-5.)

Therefore, when one of these bodies, the *Georgia* corporation, was brought into the Federal Court for the Northern District of Georgia, it went there in its separate being and capacity as a *Georgia* corporation, and the so-called ligament being absent, it did not carry with it, its Alabama namesake. Indeed, it was not a place where the Alabama 'twin' could go or be carried, as its presence there would have ousted the jurisdiction of that court over the entire cause.

It is a clear misnomer, however, and at most, judicial humor, for the learned judge to characterize these two corporate bodies as 'twins,' either of the Siamese order, or other kind, as in the very nature of things, twins can only exist where there is one common mother, and coincidence of birth.

Each of these two corporations had its own mother in a separate sovereign State, and nearly two months intervened between the birth of the original Alabama Company and the later Georgia Company.

Again, the dissenting judge says:

" If the Alabama and Georgia Manufacturing Company, " chartered in Alabama, and The Huguley Manufacturing " Company, chartered in Alabama, are separate entities " from the corporations chartered in Georgia, then they " should be held to be joint tenants, privies in estate, and " both fully bound by the proceedings had in the foreclosure " suit."

To what extent, under the general law, one joint tenant may be held bound by a judgment against his co-tenant, in a suit to which he is not, himself, a party, it is not necessary to discuss, but we respectfully insist that if such be the rule (which we do not concede,) there are many limitations upon it, and this case presents one of them.

It is to be remembered that if these two corporations were in any sense joint tenants, then one of these joint tenants was sued in a forum where the other joint tenant had no *locus standi*—where it had no power to go, and the court no power to admit it, to protect its interest in the subject of the litigation. It would indeed be an unreasonable and harsh rule which would bind the tenant, not sued, in a case like that.

It was for this very reason, viz, that the Alabama corporation neither had, nor could have, any standing in the Federal Court in Georgia, that it was compelled to resort, and did resort, to the Alabama State Chancery Court—the '*proper*' court, as declared by the Court of Appeals—(Rec. p. 556, Op. C. C. A.), where its rights and interest could be protected and enforced; and the action of the Federal Court in Georgia, in issuing the injunction, is equivalent to that court saying to the Alabama corporation, you *cannot* come into this court to assert or protect your rights, and you *shall not* go into the Alabama Court, the only court where you can be heard, but without any hearing anywhere you shall be bound by the decree here. That is, bound by its decree, notwithstanding one of the indispensable elements of jurisdiction is the *right to be present before the court and to be heard.*

In Cecil v. Cecil, 19 Md. 73, it is held that "parties, in the larger sense, are all persons having a right to control the proceedings. to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies; only those therefore who have enjoyed all these privileges, collectively, should be concluded by a decision, judgment or decree."

It must be borne in mind, that the bill in the Robinson case in the Federal Court of Georgia, sought a foreclosure of the mortgage on all the property, not only that in Georgia, *if any*, but also that in Alabama; that the title to the entire property in Alabama (as well as that described in the mortgage as lying in Georgia—the islands), was originally in the *Alabama* corporation of The Alabama and Georgia Manufacturing Company, and it was the mortgage as to that property (if there was ever any mortgage binding that property), which was sought to be foreclosed. That this title was not derived through, by, or under the Georgia Company, but was original, independent and complete, and that the *Alabama* corporation was an indispensable party to any proceeding which sought to divest that title.

Under these circumstances, even if it should be conceded that its attorneys defended the Georgia suit in the Federal Court, in the name of the Georgia Company, that fact alone would not make a decree in the Federal Court binding on the *Alabama* Company.

In VanVleet's Former Adjudication, p. 1015., it is said:

"That if one has a right which is direct and substantive, and not derivative, so that he is a necessary party defendant, he will not be bound by the judgment, if not a party, notwithstanding the fact that he assumes the defense."

In Central Baptist Church v. Gideon Manchester, 17, R. I. 492, after quoting from Wells on Res Adjudicata, and Black on Judgments, it was held:

" It is evident from these authorities that it is not suffi-
" cient to conclude a party by a judgment in a former suit
" against his servant, agent, or employee, to which he was
" not a party of record, that he employed an attorney who
" was present for him and participated in the trial, since to
" bind one, not a party of record, by a former judgment, it
" is essential that he should have openly intervened in the
" former suit, assuming its direction and control, to the
" knowledge of the opposite party for the prosecution or de-
" fense of some interest in the subject of the suit, or to avert,
" a liability he may be under to indemnify the defendant
" against an adverse judgment."

To the same point:

Black on Judgments, § 540;
Shroeder v. Lahrman, 26 Minn. 87;
Cannon River Mfg. Assn. v. Rogers, 42 Minn. 123.

In the 26 Minn. *supra,* speaking of such an estoppel claimed as to one who employed an attorney by whom the suit was defended in the name of the actual defendant, it is said:

"That he employed the attorney who appeared for the defendants and appeared as a witness for defendant, is not sufficient," (and further): "The part taken by this defendant in the former suit was not such that she could be bound by or entitled to the benefit of the judgment."

The conclusion reached by these authorities must necessarily be sound when we consider the important principle relating to estoppels, that they must be *mutual.*

Let it be supposed that Robinson, the trustee, failed in his foreclosure suit filed in the Federal Court in Georgia, against the Georgia corporations, and afterwards brought suit in Alabama against the Alabama corporations, for the foreclosure of the mortgage, could it for one moment be successfully contended that the decree against him in the Federal Court in Georgia operated as a bar or estoppel against him to the bringing of the second suit in Alabama against the two Alabama corporations, by reason of the fact that the two Alabama corporations (*if* it were a fact), had employed counsel to defend the Georgia suit in the name of the Georgia companies, and their officers or agents had appeared as witnesses in that cause? Such a contention would scarcely be entitled to respectful consideration from any court and certainly could not receive its sanction. And yet, unless such an effect could be accorded ,as against Robinson, to an unfavorable decree against him in the Georgia court it is difficult to see how, without an entire disregard of the principle of mutuality of estoppels, the decree which was actually rendered in his favor can now be successfully claimed or maintained as an estoppel against the Alabama corporation in the Alabama suit.

Or, on the other hand, let it be supposed that Robinson, the trustee, should now file a bill in Alabama against the *Alabama* Company, to foreclose the mortgage as to the Alabama property, would it be heard to set up that *it* was a party by representation or privity to the decree in the Georgia foreclosure proceedings, and that such proceedings therefore constitute a bar or estoppel to the maintenance of such a bill in an Alabama court? The statement of the question carries its own answer.

Lynde v. Columbus, C. & I. R. Co., 57 Fed. 993;
Muller v. Dows, 94 U. S. 444;

Farmers L. & T. Co. v. Postal Tel. Co., 55 Conn. 334;
Ib. 11 Atl. Rep. 184;
Russell v. Place, 94 U. S. 606.

What has been said of the binding effect of the decree of the Federal Court of Georgia upon The Alabama and Georgia Manufacturing Company of *Alabama,* is equally applicable to the two corporations under the name of "The Huguley Manufacturing Company."

The intimation of the learned dissenting judge of the Circuit Court of Appeals, that the Alabama Huguley Company had falsely admitted its citizenship for the purpose of conferring jurisdiction and thereafter losing its suit has repudiated the same, is predicated upon the assumption that the company was never incorporated in Georgia.

A copy of the last mentioned charter is not in the record. But the fact of the incorporation of a company in that name in Georgia, is charged in the original bill filed by Robinson, Trustee, against it in the Circuit Court for the Northern District of Georgia, (Rec. p. 1,) and is admitted in the answer to said bill (Rec. p. 14,) and in the joint and separate answer, demurrer, etc., as filed by the Petitioner and others to the later bill in Alabama (Rec. p. 511,) and likewise in the petition for *certiorari,* (clause *First,* p. 2.)

As to the *Alabama* corporation of The Huguley Manufacturing Company, at pages 531-5 of the Record, will be found the full proceedings for incorporation in Alabama, and the organization and undertakings thereunder — all, be it noted, under orders issued by the said J. J. Robinson, in his other capacity, as Judge of Probate of Chambers County, Alabama.

Inasmuch as the said assumption of the learned judge that the Huguley Company was not incorporated in Georgia is overborne by the record, and the Alabama Huguley Company was under all the limitations in respect of a standing in the Federal Court of Georgia, and was equally with The Alabama and Georgia Manufacturing Company of Alabama, precluded from a hearing in that court, and the Georgia Company alone could defend in that court, the intimation of the learned judge falls to the ground.

From the appellation "persistent defendants," applied by the dissenting judge to The Huguley Manufacturing Company, and his intimation *supra,* it is quite manifest that there are features of the case which have either entirely es-

caped his observation or failed to carry with him the weight to which they are entitled.

In the first place, there can never be a "persistent defendant" without a persistent *plaintiff*.

If any single fact more than another stands out conspicuously, and pre-eminently on the face of this record, it is the palpable fact that L. Lanier—the arch instigator and promoter of both the original suit in the Troup County, Georgia, court, and of the later suit in the Federal Court in Georgia—has, undoubtedly, filled the other and opposite role, to-wit, that of a consistently relentless and *persistent plaintiff*. That this cannot be gainsaid, a glance over this record and the salient features compassed under our preliminary statement of facts in this brief, at pages 1-8, will readily impress the fact upon this court—*and more!*

Because of its signal importance as a proposition, we believe, both pivotal and determinative in itself against Petitioner, we will not dwell here on this phase, but postpone to another independent head ("VII") further expose and discussion of certain vital facts, the knowledge of which has been brought home, throughout, to the said Lanier, and through Lanier, to his privies, from the consequences of which they cannot escape.

And, incidentally, we shall demonstrate that the dissenting judge did not err in charging at the door of the said Lanier and his privies, primarily and affirmatively, the plain responsibility for the "*false allegations,*" (*i. e.*, as to citizenship of defendants sued); while we shall make equally clear to this court that his charge of "fraudulent admissions" on the part of the solicitors for defendants, was undeserved. The testimony of Mr. Hammond, attorney for the defendant companies, given in the Robinson suit, shows that he had himself obtained the Georgia charter of The Huguley Manufacturing Company, and that he claimed to represent only the Georgia corporations. (Rec. p. 26.)

Robinson Was On Notice of the Rights of The Alabama Corporations.

Robinson, Trustee, and complainant in the suit in the Federal Court in Georgia, in his several capacities of (a) a citizen of Alabama; (b) of Judge of Probate of Chambers County, Alabama; and, (c) otherwise, as more fully explained in our preliminary statement of facts in this brief, was on both actual and constructive notice, first, that the said The

Alabama and Georgia Manufacturing Company was chartered and organized under the laws of Alabama (Acts of Alabama, General Assembly, Feb. 7, 1866; Rec. pp. 494-5, 551-2); and, second, that The Huguley Manufacturing Company was duly chartered and also regularly organized under the laws of Alabama. His certificate to that fact, as Judge of Probate, appears in the record, under date of Feb. 28, 1890, (Rec. pp. 531-5). And, furthermore:

It was Robinson, the Trustee in the mortgage, who with full knowledge of the two corporate entities, and that the bulk, if not all, (certainly all of any value,) of the corporate property was located in Alabama, and that the title to the whole property was in the *Alabama* corporation of The Alabama and Georgia Manufacturing Company, with [redacted] in W. H. Huguley & Company, or The Huguley Manufacturing Company, and who was, himself, residing in Alabama, in the same county, Judge of the Probate Court in that county, and who was necessarily familiar with the location of the factory in Alabama, and the history of its construction and operation by the Alabama companies, the charter of one of which he himself had issued,—yet later, in 1891, elected to go into Georgia to file the foreclosure bill, not in a State Court where all the parties in interest could come, but in the foreign Federal Court, where he knew only the *Georgia* corporations *could* come, and where he knew the two *Alabama* corporations could neither come of their own motion nor be admitted or required to come by the court.

He, himself (and Lanier), created the very conditions that restricted the defense of the suit in the Federal Court in Georgia to the Georgia corporation, and made necessary the resort by the *Alabama* corporation to the Alabama Court. Under these circumstances, it does not lie in the mouth of either Robinson, or the Petitioner in this proceeding, which claims through the said Robinson and Lanier, to complain of these Respondents for doing only what Robinson's and Lanier's own acts made it necessary for them to do. (See argument further on under Proposition "VII," and the authorities quoted thereunder.)

It would seem, in the light of these facts, that the criticism of the estimable dissenting judge might better have been reserved in toto for the *Petitioner and its privies* than directed, as they are, (in part), against these Respondents.

Recurring again briefly, to the analogy of joint-tenants, suggested by the dissenting judge as indicating the relation existing between the two corporations under the name of The Alabama and Georgia Manufacturing Company, it may be remarked that both in Georgia and in Alabama joint tenancies have long since been abolished and in the place of such relation there exists tenancy-in-common; and it is well settled that one tenant-in-common is *not* bound by a judgment against his co-tenant to which he was not a party, although he was in possession with his co-tenant at the time of the suit.

Miller v. Blackett, 47 Fed. 547;
VanVleet's Former Adjudication, p. 1191, § 587.

The illustration, however, is by no means felicitous even if it be apt. In Cameron v. McRoberts, 3 Wheat. 591, McRoberts filed his bill in equity against Cameron, Jackson and Emerson; the bill alleged that complainant was a citizen of Kentucky, and Cameron was alleged to be a citizen of Virginia; there was no designation of citizenship as to the other two defendants. All the defendants appeared and a final decree was rendered for complainant. Afterwards, the defendant, Jackson, moved the court to set aside the decree and dismiss the suit for want of jurisdiction, upon the allegation that all the defendants, including Jackson, were citizens of Kentucky.

This court, in reply to questions certified for its decision, among other things, held:

" If a joint interest vested in Cameron and the other de-
" fendants, the court had no jurisdiction over the cause. If
" a distinct interest vested in Cameron so that substantial
" justice (so far as he was interested) could be done without
" affecting the other defendants, the jurisdiction of the court
" might be exercised as to him alone."

From what has been said, it is quite apparent that the dissenting judge is mistaken in treating the two corporations as twins; mistaken in his view that wherever one may go, the other may or must go, and mistaken in saying that whatever one does the other does; for having been incorporated under the laws of different States, each is limited and controlled in its power to act by the laws of its respective State, and that there is a radical and conspicuous difference between these laws in respect of the rights and powers of the two corporations to act, in at least one respect is manifest from the two charters; one of which authorizes the *Alabama* corporation to establish its plant in Alabama, on the

west side of the Chattahoochee river, and the other, the Georgia charter, authorized the Georgia corporation to establish its plant on the *east*, or *Georgia*, side of the river, and prohibits it from erecting buildings or disturbing vested rights of the Alabama corporation, which had been acquired by the latter under its Alabama charter previous to the grant of the Georgia charter to the Georgia company.

It is entirely clear from the facts as shown by the record, and the law as applied to those facts in the authorities we cite, that there were two separate and distinct corporations under the name of The Alabama and Georgia Manufacturing Company, one created by and having its habitat in the State of Alabama; and the other created by and having its habitat in the State of Georgia; that there was not, and could not be, a mystic, undefined corporate nondescript under that name, destitute of legislative parentage, having a floating habitat in either State, at its will, and owning property in both States, which it could dispose of in either State, regardless of the situation of the property. Such a corporate body, we take it, is a legal impossibilty.

If the mortgage was executed by the *Georgia* corporation, and that is the allegation in the Robinson bill, and the insistence of Petitioner, then it could effectively embrace only such property as the *Georgia* corporation owned. And all the property owned by the Georgia corporation which could be affected by the mortgage consisted of its franchises and the riparian rights granted to it by the Legislature of Georgia. When sued it had a right to defend the foreclosure for whatever right it had or thought it might have.

By the express terms of its charter that corporation was authorized, only, to erect its buildings on the *east*, or *Georgia*, side of the Chattahoochee river, and by implication was prohibited from constructing any buildings or plants on the west, or Alabama, side.

The express limitation of the Georgia Company, by its charter, to the ownership of buildings and plants on the *east*, or Georgia, side involves in itself a negative and the negative is that it shall not construct buildings or a plant on the west or Alabama side; and in addition to this implied negative there is an express inhibition upon its disturbing or interfering with the vested rights of any person on the *west*, or *Alabama*, side of said river, or even the *islands* therein. (Rec. pp. 530, 553.)

Furthermore, the record shows that the *title* to the Alabama property (and, as we insist, also that described in the mortgage as being in Georgia,) was originally, and still is,

vested in the said *Alabama* corporation of The Alabama and Georgia Manufacturing Company. (Rec. pp. 486-7, 505, and see Op. C. C. A. p. 536, 127 Fed. 501.)

In this view of the case, the mortgage described in Robinson's bill, and which he foreclosed, undertook to cover property the Georgia corporation was prohibited by its charter from acquiring, and title to which was in another corporation, and the foreclosure could only affect such property, if any, as was located in Georgia, and that might be owned by the Georgia Company.

So, also, if it should be a fact that the Georgia Company lawfully owned and lawfully mortgaged the Alabama property, then, as elsewhere shown in this brief, the United States Circuit Court for the Northern District of Georgia, in which the foreclosure proceedings were had, acquired no jurisdiction of the Alabama property, and its mere decree *in rem*, and its sale by master commissioner, *did not* and *could not*, pass any title to the property in Alabama; that could only have been accomplished in such suit by a decree *in personam*, requiring a conveyance from a party to the suit *having the title*.

On the other hand, if the mortgage Robinson sought to be foreclosed in the Federal Court in Georgia, was executed by the *Alabama* corporation and not by the Georgia corporation, then, it requires no argument to show that the plaintiff Robinson, a citizen of Alabama, could not be allowed, under the false allegations of his bill to continue his suit against a corporation of Alabama, now after that fact is made apparent, where the relief sought is not to carry a final decree into execution, but, under the equities of the original bill, to enlarge the relief granted and cure defects in the former decree.

Assuming that *both* corporations had some kind of joint interest in the property (the record showing only the Alabama Company to have any,) and if *both* corporations severally executed the mortgage (of which there is no allegation or proof in the record,) then, of course, foreclosure in each State as to the property respectively therein would have been necessary.

Graham v. Boston, etc. R. R. Co., 118 U. S. 168;
Lynde v. Columbus, C. & I. Ry. Co., 57 Fed. 993;
Pittsburg & State Line Ry. Co. v. Rothschild, 26 Am. & Eng. Ry. Cases, 50;
Newton v. Eagle & Phoenix Mfg. Co., (explained *supra*.

If either of these views is sound it necessarily results that there has never been any efficacious foreclosure of the mortgage in so far as the Alabama property is concerned, and, therefore, the bill for redemption in the Chancery Court of Alabama was properly filed, and should not have been interfered with by the Federal Court in Georgia, by injunction or otherwise.

VI.

THE BILL FILED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, CANNOT BE SUPPORTED AS AN ANCILLIARY OR SUPPLEMENTAL BILL, NOR AS AN ORIGINAL BILL.

The only theory upon which the injunction bill in the Federal Court in Georgia, is sought to be maintained, and upon which the decree therein was rendered, is that it is an 'ancillary' or 'supplemental' bill to the Robinson suit, and that it was, therefore, maintainable irrespective of the citizenship of the parties thereto.

There have been many decisions on this question made in the United States Circuit Courts, and several made by this court—notably among the latter are:

French v. Hay, 22 Wallace, 250;
Dietzsch v. Huidekoper, 103 U. S. 494;
Root v. Woolworth, 150 U. S. 401;
Julian v. Central Trust Co., 193 U. S. 93;
Raphael v. Trask, 194 U. S. 272.

In most of the cases on this subject, the right to proceed by ancillary or supplemental bill is limited in so far as parties are concerned to such as were either actual parties to the original cause or concluded or affected thereby as privies or by representation, and wherever that was so, the matter of citizenship had no bearing on the jurisdiction.

French v. Hay, Dietzsch v. Hidekoper, and Root v. Woolworth, come within that class.

In Raphael v. Trask, in which this court held there was no jurisdiction, the bill was sought to be maintained by an independent party.

In the Julian case, independent parties, viz., subsequent creditors, were allowed to be brought in as defendants and enjoined from levying upon and selling property which the Federal Court had previously sold under foreclosure proceedings, but had reserved in its decree the right to retake possession of the property upon failure of the purchaser to comply with the decree of sale, and also the right to adjudicate all liens, claims and equities in respect of the property, preferential or otherwise.

Upon principle, the jurisdiction ought to be confined to cases where the parties to the ancillary bill were either actual parties to the original proceeding or affected thereby either by privity or representation, or where the original proceeding involved a trust fund, in all of which instances the question of diverse citizenship would be immaterial, and that seems to be the view of this court in the last case, Raphael v. Trask, *supra*, where it was held there was *no* jurisdiction of such a bill, where diverse citizenship does not exist, unless there is privity of contract or trust relations between complainants and defendants.

But whatever the conclusion may be as to the right to bring in as a party to such a bill, a defendant who had no sort of connection with the original proceedings and who was not in any way bound by it, it is fully recognized by all the authorities that the ancillary or supplemental bill only lies "to protect the *rights adjudicated* by the court in reference to the subject-matter of the litigation, *and in aid of the jurisdiction of the court*, with a purpose of carrying out its decree and rendering effectual rights to be secured or already adjudicated."

1 Bates on Fed. Eq. Procedure, § 97 (note.)

In the case at bar, there is a failure of jurisdiction, under the ancillary bill, in both aspects.

In the first place, the two Alabama corporations were not parties to the original proceeding, the Robinson suit, either actual or by privity or by representation; they could therefore only be made parties to the ancillary bill by due and legal service upon *them—not* upon the *attorneys*, for, not being parties of record, they could have no attorneys of record, and so far as the record shows, the attorneys of record for the defendants were the attorneys of the *Georgia* companies, and *not* of the Alabama companies, (Rec. pp. 8-9). Furthermore, if the Alabama companies had attorneys of record substituted service upon them, could, as elsewhere

shown in this brief, be made only after proper showing to the court and an order made to that effect. Nothing of that kind occurred in this case.

Pacific Ry. v. Missouri Ry., 1 McCreary, 647.

Again, W. H. Huguley, a citizen of Alabama (Rec. p. 488,) and W. T. Huguley, a citizen of New York (Rec. p. 492,) who were served, were served in the State of Georgia, as *individuals* (Rec. p. 501,) though the companies on whose behalf, it is now claimed, they were served were impersonal citizens of Alabama, and such service, as we have shown in another part of this brief, was not effectual to bind the *Alabama* corporations.

Opinion C. C. A. (Majority,) Rec. p. 557, 127 Fed. 502.

The only appearance of the Alabama Company, after that service, was by way of objection to the jurisdiction of its person, and of the property in Alabama, and it stood on that objection.

Opinion C. C. A. (Majority,) Rec. p. 557, 127 Fed. 502.

But even if this court should go to the extent of holding that it was competent to make the Alabama corporation a party defendant, and that the service on it for that purpose was regular and effectual, there still remains the objection that inasmuch as the Federal Court in Georgia never had jurisdiction in the Robinson suit of the property located in Alabama, and its decree of foreclosure in the Robinson suit was merely a *void* decree *in rem*, attempted to be executed simply by a sale by its master commissioner in Georgia, neither accompanied by deed from the *Alabama* Company, holding title, (nor from the Georgia Company, even,) then it follows that the ancillary, or supplemental bill was not a bill to *protect matters already adjudicated* in the Robinson suit, and as the interest of the Alabama Company never could be adjudicated in that cause and court, the ancillary or supplemental bill could in no sense be called "a bill in aid of the jurisdiction of that court with a purpose of carrying out its decree and rendering effectual rights to be secured or already adjudicated."

No rights of Robinson, the trustee, (and complainant in the original suit,) against the Alabama Company, could have been adjudicated in the original procedure without making the Alabama Company a party, and had that been done the

jurisdiction of the Circuit Court over the entire cause would have been destroyed. It is difficult to imagine how a jurisdiction can be acquired by a mere ancillary or supplemental bill, which was wholly lacking in the original suit, when the ancillary bill, in its very nature, is but the continuation of a jurisdiction already acquired. We could as well conceive of a branch without a vine, or a graft without a stock as of an ancillary jurisdiction without an original jurisdiction.

It follows from the foregoing, that under the foreclosure proceedings, in the mode in which they were conducted, the alleged purchaser, who is the Petitioner here, for the several reasons stated in this brief, not only did not, but could not, acquire any interest whatever in the Alabama property, which was without the jurisdiction of the Georgia court, but none even in the said islands (erroneously) described as being in Georgia.

The Alabama Company, by its Alabama bill, is seeking to enforce its equity of redemption in all the property, averring it to be *all* in Alabama, (Rec. pp. 488, 490-1, 498-9, 505.) The ancillary, or supplemental, bill, seeks to enjoin it from prosecuting its bill as to all the property, and the injunction was so granted and issued.

If it should be a fact that any part of the property is in Georgia, the injunction should, at least, have been confined to restraining the Alabama bill only in so far as it sought redemption as to the Georgia property—(islands only), and even this Respondents do not concede. And it was clearly error to extend the injunction to that part of the bill seeking redemption as to the *Alabama* property—concededly all the factory plant, and village, and all that carries any intrinsic value.

At the same time, we respectfully insist that, even as to the property described in the mortgage as falling within the Georgia jurisdiction, if any, (certain isolated islands, only, of no value,) the foreclosure decree and sale were altogether ineffective to cut off the equity of redemption in the said "The Alabama and Georgia Manufacturing Company of the State of *Alabama*, Chambers County," (owning title to the *whole* property,) or in the Huguley Company, the Federal Court in Georgia having been without jurisdiction of these companies and devoid of all power to acquire such jurisdiction in said foreclosure proceedings.

That the bill in the Circuit Court for the Northern District of Georgia cannot be supported as an ancillary, or sup-

plemental bill, nor as an original bill, as we contend, would seem to be made clear by the following adjudications which we subjoin herewith:

In Mercantile Trust Co. v. Kanawha & Ohio Ry. Co., 39 Fed. 337, (elsewhere referred to in differentiating "Muller v. Dows,") Mr. Justice Harlan, after reviewing the facts, concluded in the following strong words:

" It might be well if Congress would so enlarge and regu-
" late the jurisdiction of the courts of the United States as
" to enable a Circuit Court, in which is brought an original
" suit for the foreclosure of a mortgage resting upon an in-
" terstate railroad, to take actual possession by its officers
" of the entire line, and of all the mortgaged property,
" wherever situated, and administer it for all concerned;
" preserving in that mode the unity of the road, and the just
" rights of mortgagor, mortgagees, and creditors, as well as
" those of the general public interested in commerce among
" the States. *But there has been no such legislation, and we*
" *do not see our way clear to effect any such result by judi-*
" *cial orders merely.*"

And the court held, that a suit filed in said court to foreclose a mortgage upon the lands of the railroad situated in West Virginia, as ancillary to a similar suit filed in the State Court of Ohio as to lands in that State, under the same mortgage, could not be maintained because it was an action against the land in West Virginia, and, therefore, was without the jurisdiction, even by ancillary proceedings, of the Ohio court. It was held that the bill in West Virginia must be filed as an *independent* bill.

The United States Circuit Court, in McWhorter v. Halstead, 24 Fed. 828, held distinctly that ancillary proceedings, coupled with a restraining order preventing the defendants in such proceedings from conducting a separate suit in a State Court, will only lie when the jurisdiction of the State Court has not yet been invoked.

The doctrine that in ancillary proceedings the court cannot interfere, by restraining order, with a distinct and independent suit, either *in rem* or *quasi in rem*, where property is situated in another State, goes so far that the Federal Court, in the case of Schindelholz v. Cullum, 55 Fed. 885, decided in the Eighth Circuit Court of Appeals, that where a court of equity appointed a receiver to take charge of lands

situated in another jurisdiction, it had no power to enjoin a citizen of such jurisdiction from levying an attachment upon such lands unless he was a party to the litigation in which the receiver was appointed.

In Gates v. Bucki, 4 C. C. A. 116, 53 Fed. 961, it was held that where an attachment is levied on realty in a suit in the State Court, and proceedings in equity to cancel an alleged fraudulent conveyance of the attached property are also instituted therein, the United States Circuit Court *cannot* acquire jurisdiction of the land, so as to enable it to enjoin the litigants in the State Court from proceeding therein, at the instance of a party to such equitable suit, who has filed a bill in the Federal Court to foreclose a mortgage on the land in question. Process issuing out of a State Court is a "proceeding" within the meaning of the statute. "Circuit Courts and State Courts act separately and independently of each other, and in their respective spheres of action, the process issued by one is as far out of the reach of the other as if the line of division between them was traced by landmarks and monuments visible to the eye."

Riggs v. Johnson Co., 6 Wall. 195."

" Even if a State Court seeks to enforce a law which is in " direct violation of the Constitution of the United States, a " Federal Court cannot interfere, either directly or by a writ " of injunction against the parties before the court or the " officers of the court acting under color of its authority. " *The remedy is to allow the proceedings in the State " Court to pass to judgment, and, if the highest court of the " State should support the judgment, then to carry the case " up by writ of error to the Supreme Court of the United " States.*"

Live Stock Dealers & Butchers' Ass'n. v. Crescent City Live Stock Landing & Slaughter House Co., Fed. Cases, No. 8408; and see,
Rensselear & S. R. Co. v. Bennington & R. R. Co., 18 Fed. 617;
Yick Wo. v. Crowley, 26 Fed. 207.

In the former case, (No. 8408,) the court held:

" The objection that the Circuit Court of the United " States *cannot* enjoin proceedings in the State Court, is an " objection which cannot be surmounted."

And after saying Congress might enact different legislation, (*i. e.*, from Rev. Stat., § 720,) 'but Congress has not yet assumed that jurisdiction,' the court proceeds:

" Sec. 3 of the act of 1873 declares that no writ of injunc-
" tion shall be granted to stay proceedings in any court of a
" State. This act has never been repealed. The court,
" therefore, feel compelled to refuse the injunction to re-
" strain the defendants from proceeding with the legal rem-
" edy which they have instituted in the State Court. The
" remedy of the parties is to allow the proceedings to pass
" to judgment, and if the highest court of the State should
" decree against the construction of the Fourteenth Amend-
" ment, which is claimed by them, and which this court has
" assented to, *then they can carry the case up by writ of er-*
" *ror to the Supreme Court of the United States, and have*
" *the whole question reviewed.*"

And in the latter case cited, *supra,* (Yick Wo. v. Crowley, 26 Fed. 210,) after exhaustive review of the authorities, the court said:

" This is clearly within the prohibition of the statute, as
" repeatedly construed by the courts; and this court has no
" authority to restrain those proceedings. Within the last
" fifteen years a great many applications, under a great va-
" riety of circumstances, have been made to this court for
" preliminary injunctions to restrain proceedings in the
" State courts in civil cases, *and they have invariably been*
" *denied,*" etc.

See, also, opinion of Mr. Justice Bradley, in Haines v. Carpenter, 91 U. S. 254, and the strong language employed by him in this connection, and holding against injunctions by the Circuit Federal Courts of one State being levied against proceedings had in the State Court of another State, saying: *"This is one of the things which the Federal Courts are expressly prohibited from doing."*

" After a decree has been completely carried into effect, a
" motion for injunction cannot be made in the cause as it is
" out of court."

Kerr on Injunctions, p. 662.

In Beach on Injunctions, Vol. 1, § 75, touching upon the question of "Extra-Territorial Jurisdiction," the author says:

"Jurisdiction by *injunction* does not extend *beyond* the "State in which the injunction was issued unless the court "has acquired jurisdiction of the *person* of the defendant."

Western Union Tel. Co. v. Pacific, etc. Tel. Co., 49 Ill. 90, where the court said:

"The jurisdiction of our courts is only co-extensive with "the limits of our State. *They cannot legally send their pro-* "*cess into other States and jurisdictions for service.* If the "exercise of such a jurisdiction were attempted and an in- "junction granted, and it should be disobeyed by persons "in Indiana, this court would be powerless to enforce the "injunction by attachment, and hence the effort to exercise "such a power would be readily defeated. * * * 'The "courts of this State *cannot* restrain citizens of another "State who are *beyond* the limits of this State from per- "forming acts in another State, or elsewhere outside of and "beyond the boundary lines of this State. Any other prac- "tice would necessarily lead to a conflict of jurisdiction."

Hazlehurst v. Savannah, etc. R. R. Co., 43 Ga. 13;
Adams v. Lamar, 8 Ga. 82;
Dearing v. Charleston Bank, 5 Ga. 497."

"'And an order will *not* ordinarily be granted staying "plaintiff from pursuing in the courts of another State "*lands situated therein, belonging to defendant,* as such an "order would be a violation of the comity between the courts "of different States;

Durant v. Pierson, 12 N. Y. Sup. 145, distinguishing Brewer v. Durant, 43 Hun. 348'."

"The inconvenience of ascertaining facts and of going to "another State to defend the action there, is not sufficient "ground to enjoin the prosecution of an action there.

Donnelly v. Morris, 59 N. Y. Super. 557."

"*Sec.* 78. *Same Subject Illustrated in Alabama.*—It has "lately been decided by the Supreme Court of Alabama in a "case in which *both parties were citizens of Alabama*, that a "court of equity of that State had power by judgment *in* "*personam* to restrain defendant from further prosecuting "an action by attachment and garnishment in a Louisiana

" court, to reach *money* due plaintiff in that State, which, " under the laws of Alabama, is exempt from legal process, " but which is not exempt in Louisiana;

Allen v. Buchanan, (1892,) 11 So. Rep. 777; *Ib.* 97 Ala. 399.

" Note 1. The following is from the opinion: 'And so " long as the relief sought may be worked out directly on the " *person* of the defendant, and indirectly through his person " or property in a foreign jurisdiction, it is immaterial what " form the decree assumes'," etc.

And the author adds:

" The foregoing doctrine, though upheld by the highest " authority, has been criticized by some as an undesirable " inheritance from the English Court of Chancery and as " incompatible with our free institutions." (N. 2.)

In the note (2) referred to, it is said:

" In commenting upon such Alabama decision, the edi- " tors of the American Law Review, for May-June, 1893 (27 " Am. Law R. 469,) use this language: 'It should be added " that while the Supreme Court of the United States has " recognized this doctrine as not infringing upon the Fed- " eral Constitution, (Cole v. Cunningham, 133 U. S. 107,) " there is a good deal of American authority against the pro- " priety of the exercise of such a power. It is a doctrine " which we have inherited from the English Court of Chan- " cery, whose practices were in many cases grossly tyranni- " cal. That court did not hesitate, by exerting its power *in* " *personam*, against any person whom it could catch within " its jurisdiction, to decide controversies depending in any " part of the world, even in regard to *land titles*, which are " of strictly *local* cognizance. It is believed that the exercise " of the power ought to have been rejected by American " courts from the first as incompatible with the principles " of our free institutions. The fact that so many of them " have laid hold of it and upheld it, is a striking illustration " of what may justly be called selfishness of courts, proving " that judges are just as greedy of jurisdiction as men are of " gain, and in obedience of the same law of human nature'."

The New York Law Journal, of date June 9, 1893, in lend- ing its emphatic endorsement of the foregoing protest, has this to say:

" We concur in the spirit of these remarks to the extent of " believing that the power to issue injunctions against act-

" ions in sister States should be sparingly exercised, and " only when the peculiar necessity therefor is very obvious. " * * * In Kittle v. Kittle, 8 Daly, 72, the rule is stated " that our courts, from motives of comity and public pol- " icy, will not restrain parties by injunction from proceed- " ing in actions commenced by them in other States, except " in very special cases, to prevent injustice and oppression. " * * * On the whole, we believe that this special branch " of equity jurisdiction should not be extended beyond the " limits set by existing authorities."

In Averill v. Southern Ry. Co., 75 Fed. 736, it is said:

" 25 Stat. 433, provides that no civil suit shall be brought " in a Federal Court against any person by any original " process or proceedings in any other district than that " whereof he is an inhabitant. *Held*: *That a corporation of " one State cannot be affected by an order or writ of injunc- " tion issued by a Federal Court in another State.* * * * " As such writ or order operates only on the *person*, and the " person must be within the jurisdiction."

Before closing this branch of the argument, as well pointed out in the opinion of the Circuit Court of Appeals, at pages 556-7 of record:

" To this bill filed in the State Court of Alabama, the ap- " pellee,—(the Petitioner here,)—joined by the other cor- " porations made respondents therein, filed their joint and " separate answers, demurrer, pleas and motion, the copy of " which filed papers, as shown in the record, without the ex- " hibits, covers ten and one-half closely printed octavo pages. " In connection with which we note in the additional brief " submitted for the appellee (Petitioner,) this language: " 'It was absolutely necessary to file an answer in the Chan- " bers County suit within thirty days after the filing of said " bill to prevent the rendition of a decree *pro confesso*."

In view of such admitted appearance and the filing of its said defense in said Alabama State Court, we submit, Petitioner is committed to that forum. And the Alabama State Court jurisdiction attaching, its exercise *cannot be enjoined.*

Sec. 720, R. S.;
Peck v. Jenness, 7 How. 320.

VII.

TITLED VESTED IN "THE ALABAMA & GEORGIA MANUFACTURING COMPANY, OF THE STATE OF ALABAMA, CHAMBERS COUNTY," AND DULY RECORDED THEREIN,—PURCHASERS AND THEIR PRIVIES HAVING BOUGHT AND TAKEN POSESSION OF ITS LEGAL ESTATE WITH KNOWLEGE OF ITS PRIOR RIGHT AND TITLE, POSSESSORS IN BAD FAITH AND HOLDING IN FRAUD OF THOSE RIGHTS, AND CANNOT FOUND A PRESCRIPTIVE RIGHT THEREON.—NO ESTOPPEL AGAINST SAID ALABAMA COMPANY.

It affirmatively appears on the face of the record in this cause, that the original *Alabama* corporation entitled "The Alabama and Georgia Manufacturing Company," and *it* only, was, in 1866, seized and possessed of all the lands and property in controversy, and there is absolutely no evidence whatever to the contrary. (Rec. pp. 486-7, 505, 544, 177, 184, Op. C. C. A. p. 556, 127 Fed. 501.)

Thus, by virtue of the registry of said deed in the Probate Court of Chambers County, as explained; by virtue of all the other collateral facts more fully detailed under our preliminary review prefacing this brief, and patent on the face of the records, and lastly, through said J. J. Robinson, Trustee, and the notice, actual and constructive, which *he* likewise had, as shown under our proposition "V" hereinabove, it follows:

1st.—That *knowledge* of the title, rights and interests vested in the said "The Alabama and Georgia Manufacturing Company *of the State of Alabama, Chambers County,*" was thereby brought directly home to both the said L. Lanier and Robinson, Trustee, and through them, as well as through other independent avenues of notice, both express and constructive, that knowledge was also, in turn, brought home to those claiming by, under or through them, and their privies, whether as purchasing bondholders or as the West Point Manufacturing Company, or the Galeton Cotton Mills, or the Petitioner, the Riverdale Cotton Mills;

2d.—That the said purchasers and their privies, including the Petitioner, having bid and bought through the said L. Lanier, and taken possession of its legal estate with full

knowledge of said prior right and title vested in the said *Alabama* corporation as such, were purchasers *in bad faith,* and posessors holding throughout *in fraud* of the rights of that *Alabama* Company;

3d.—That the said purchasers and their privies, so holding under an alleged title in bad faith, and their possession having been taken in disregard of the rights of the said *Alabama* Company, of whose title the claimant had or could have been fully informed, with proper inquiry, *cannot found a prescriptive right* upon such a title;

4th.—That the said named *Alabama* corporation, holding a deed to all the property in controversy, which it has placed on record, and never having been made a party to the suit in the Georgia Court, and the Georgia Court being without jurisdiction to pass adversely upon its rights, *is not estopped* from making its claim thereto in the Alabama State Chancery Court, as it has done under its said bill (for redemption) of May 2d, 1901.

For the better information of the court, Respondents, having been at special pains to throw all possible light upon the recognized peculiar circumstances and conditions constituting the *facts* of this particular case, in now insisting upon the foregoing four important propositions of *law,* as applicable thereto, beg to subjoin in support thereof, a number of authorities, each group classed under its own distinctive head, all of which, considered singly and as a whole, with special reference to the said facts and legal propositions deduced therefrom, would seem to be conclusive and determinative in the case at bar.

First and Second—As to Notice, Actual and Constructive.

In Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 425-450, after statement of the case, in the course of an instructive review of the authorities, Mr. Chief Justice Fuller, in the opinion, said:

" Apart from this we hold Appellant chargeable with no-
" tice. The *rule* is thus stated by the Virginia Court of Ap-
" peals, in Burwell's Adm'rs. v. Fauber, 21 Gratt. 463: 'Pur-
" chasers are bound to use a due degree of caution in making
" their purchases, or they will not be entitled to protection.

" *Caveat emptor* is one of the best settled maxims of the " law, and applies exclusively to a purchaser. He must take " care, and make due inquiries, or he may not be a *bona fide* " purchaser. He is bound not only by actual, but also by " constructive notice, which is the same in its effect as actual " notice. He must look to the *title papers* under which he " buys, and is charged with notice of all the facts appearing " upon their face, or to the knowledge of which anything " there appearing will conduct him. He has no right to shut " his eyes or his ears to the inlet of information, and then " say he is a *bona fide* purchaser without notice." (Authori- " ties.)

" Lord Hardwicke observed in LeNeve v. LeNeve, Amb. " 436; 3 Atk. 646; 1 Ves. Sen. 140: 'That the taking of a " legal estate, after notice of a prior right, makes a person a " *mala fide* purchaser," etc.

And after laying down the *rule*, as briefly quoted above, this court held, among other things, to the following effect:

" When each and all of the individuals who organize a " corporation under a State law, had knowledge or actual " notice, of a defect in the title to lands acquired by the " corporation through them, *their* knowledge or actual no- " tice was knowledge or notice to the *Company*, and if con- " structive notice bound them, it bound the Company." " (H. N. 4.)

" The rule of *Caveat emptor* applies exclusively to a pur- " chaser, who must take care, and make due inquiries, and " is bound by *constructive* as well as by *actual* notice—the " latter being equivalent in effect to the former; but, in ap- " plying the rule, each case must be governed, in these re- " spects, by its own particular circumstances. (H. N. 6.)

" Actual and unequivocal adverse possession of land is no- " tice to the purchaser; it is incumbent upon him to ascer- " tain by whom and in what right it is held, and the unex- " plained neglect of this duty is equivalent to notice." (H. " N. 7.)

" A purchaser must be presumed to investigate the title of " the property he purchases, and may, therefore, be presum- " ed to have examined every instrument forming a link, di-

" rectly or by inference, in that title; and that presumption " I take to be the foundation of the whole doctrine."

Story's Eq. Jurisp., Vol. 2, p. 362, note to § 1020.

" In Goundie v. Northampton Water Co., 7 Barr, 233, it " is decided that after the registry of a deed, the owner need " not give notice of his title at sheriff's sale of another title, " nor to one making improvements. The party who has " placed his written title *on record* has given the notice which " every person is bound to know and respect. The law does " not require him to go further."

Knouff v. Thompson, 16 Pa. St. 357.

" Trustees and other representatives, *with custody of* " *papers*, have ample opportunities to discover *defects in the* " *title* of property in their care, and *are estopped* from set- " ing up title adverse to their trust."

Code of Georgia (1895,) Vol. 2, p. 1463, § 5153, citing:
Benjamin v. Gill, 45 Ga. 113;
Allen v. Solomon, 54 Ga. 486.

" A party is not entitled to an injunction who shows that " he has been negligent and careless in guarding his rights, " and that if he has been subjected to loss, it was because he " had not attended to his interests in proper time. (28 Ga. " 117.) If a party, by reasonable diligence, could have had " knowledge of the truth, equity will not relieve. (Code, § " 3136.) That it was his duty to have *searched the records* " and examined the premises, etc., * * * (See 28 Ga. " *ut sup.*, and 60 *Ib.* 395, 396.) As this applies with in- " creased force to judicial or quasi-judicial sales, where " *'caveat emptor'* is the *rule* that purchasers are to observe."

Wylly v. Gazan, 69 Ga. 517-8; see, also,
Code of Georgia, Vol. 2, § 5449; 14 Ga. 157.

In Johnson v. Thweatt, 18 Ala. 741, 747, it is said:

" The principle is well settled, that when a purchaser can- " not make out his title but by a deed which leads him to an- " other, he cannot be a purchaser without notice of this *other* " deed, and, of course, of all its provisions. A purchaser has " the right to call for and examine the chain of title to the " land he is about to purchase, and if he neglects to do this " and purchases without seeing the deeds, through which he " is receiving title, it is his own *folly;* in the language of the

" authorities, it is *crassa negligentia*, and he cannot protect " himself from the consequences of notice, by insisting up- " on his own folly or neglect." (Authorities.)

" This case was approved fully in Witter v. Dudley, 42 " Ala. 616, 621-2, upon the authority of 2 Leading Cases in " Eq., W. & S. 153, and Jones v. Smith, 1 Phil. Ch. R. 243, the " court adding: 'This case has never been overruled or ques- " tioned by this court, and we feel constrained to adhere to " it."

In Wade on the Law of Notice, § 12, it is said:

" It was held by Judge Bliss that 'If the deed was actually " put upon record, although not so acknowledged that the " record would be constructive notice, and *if the party saw* " *that record*, it would be very strong, if not conclusive evi- " dence of the actual notice required by the statute. The ob- ' ject of the registry act is to protect *innocent* purchasers, " and no subsequent purchaser can be innocent *who knew of* ' *a previous conveyance.*" (Authorities.)

" The learned judge would probably have gone further, " had the case required it, and laid down the doctrine that " one who had seen a *copy* of the prior deed, under such cir- " cumstances, would be in possession of such notice as to " render *fraudulent* a subsequent purchase by him of the " property thereby conveyed." (pp. 10-11.)

" The most obvious and direct manner in which the sub- ' sequent party may be warned of the adverse interest is by " *actual knowledge of the prior conveyance or equity;* for in " determining questions of *good faith, knowledge* is regarded " as equivalent to *notice of the highest degree.* * * * * " Then would naturally follow in their order, *express notice,* " or *direct information, oral* or *written*, from some person " in possession of actual knowledge; and *implied* notice, or " knowledge of collateral circumstances, sufficient to put the " purchaser or incumbrancer upon inquiry leading to the " truth." (Sec. 65, p. 44.)

In Angle v. N. W. Mut. L. Ins. Co., 92 U. S. 342, (23 L. ed. 556,) it is said:

" Constructive notice in such cases is held sufficient, upon " the ground, that, when a party is about to perform an act " which he has reason to believe may affect the rights of " *third persons*, an inquiry as to the facts is a moral duty, " and diligence an act of justice. Whatever fairly puts a " party upon inquiry in such a case is sufficient notice in " equity, where the means of knowledge are at hand; and if " the party, under such circumstances, omits to inquire, and " proceeds to do the act, he does so at his peril, as he is then " chargeable with all the facts which by a proper inquiry, he " might have ascertained." (Authorities.)

In Am. & Eng. Ency. of Law, Vol. 16, p. 791, it is held:

" In Griffith v. Griffith, Hoff. Ch. (N. Y.), 153, it is said " that 'Constructive Notice is of two kinds—that which arises " upon testimony, and that which results from a *record*. In- " stances of the latter are the contents of all *public records*, " which are declared to be *notices to all persons*'."

" The principle of the doctrine of constructive notice is, " that when a person is about to perform an act by which he " has reason to believe that the rights of a *third party* may be " affected, an inquiry into the facts is a moral duty, and dili- " gence is an act of duty. Hence, he proceeds at his peril " when he omits to inquire, and is chargeable with a knowl- " edge of all the facts that by a proper inquiry he might have " ascertained. This neglect is followed by all the conse- " quences of *bad faith*, and he loses the protection to which " his ignorance, had it not proceeded from neglect, would " have entitled him."

Pringle v. Phillips, 5 Sandf. (N. Y.), 157."

" The *filing of a bill* is considered by all the authorities as " tantamount to actual notice. In fact, it is the *most solemn* " *and authoritative* of all forms of notice."

Gordon v. Tweedy, 74 Ala. 235.

" Where one is put upon inquiry, as by references con- " tained in his *title deeds*, he is chargeable with knowledge " of what he might have ascertained by due inquiry."

Oliver v. Piatt, 3 How. 410, 11 L. ed. 622; see also:
McClure v. Township of Oxford, 94 U. S. 432, 24 L. 129;
The Lulu, 10 Wall. 201, 19 L. 906.

Third—As to Title by Prescription.

In Gaines v. Hennen, 21 How. 553, 568-9, this court said:

" By the article of the Code, 3484, a legal interruption of " the prescription takes place where the possessor has been " called to appear before a court of justice, either on " account of the property or the possession, and the pre- " scription is interrupted by such demand, whether the suit " has been brought before a court of competent jurisdiction " or not. * * * After the interruption of the prescrip- " tion by the filing of the bill by the complainant, the de- " fendants could no longer claim to be in possession in good " faith, as that is defined in the Civil Code. In Article 3415 " the possessor *in bad faith* is *he* who possesses as master, " but who assumes this quality *when he well knows that he* " *has no title to the thing, or that his title is vicious and de-* " *fective.*

" The possessor must not only not be in *bad faith*, but in " the positive belief that he is the *true* owner, and if he " doubts the validity of his title, his possession is not the " basis of prescription."

Troplong Prescription, Vol. 2, p. 451, No. 927;
Ib. p. 444, No. 918;
Ib. p. 442, No. 915."

" Possessors in *bad faith cannot* claim the benefit of pre- " scription."

Gaines v. New Orleans, 1st Wood, U. S. Rep. 104;
Ib. 6 Wall. 715-6.

In Hunt v. Dunn, 74 Ga. 120, it is said:

" 1.—It is unquestionably true that the written title on " which a possession is based, to sustain a *prescription*, " must be neither forged nor fraudulent, if 'notice' of the " fraud or forgery 'be brought home to the claimant before " or at the commencement of his possession'." (Code, 2683.)

" The question here is, did Thompson and Cross have ac- " tual notice that they were purchasing a *bad* title when " they took possession? If they did, then their purchase " was *bad*, and they went into possession in fraud of the " rights of the true owner.—44 Ga. 573, 51; *Ib.* 139.

" In the last cited case, it is held that the claimant, when " he went into possession of the property, had knowledge " that his written evidence of title was fraudulent, or if

" notice thereof was brought home to him at the commence-
' ment of his possession, or before, then he *cannot found a*
" *prescriptive* right upon such title. That which puts a
" party upon inquiry is actual notice, as has been frequently
" held by this court.

" In Jordan v. Pollock, 14 Ga. 157, it is said: 'That no-
" tice is sufficiently actual, which by the proof, either posi-
' tive or presumptive, brings home to the purchaser such
" knowledge of the circumstances as authorizes the clear
" and satisfactory conclusion that he had notice of the prior
" incumbrance, or such as renders proper the conclusion
" that he was, or should have been, put upon inquiry.'
' (italics ours), 'that such notice is, in the language of Sir
" Edwin Sugden, '*good notice*,' and is so because it author-
" izes a conclusion which affects the conscience of the pur-
" chaser, and makes it a *legal fraud* in him to buy under the
" circumstances. If, under such notice, he afterwards buys,
" *mala fides* marks the transaction.

" See also, 69 Ga. 92, 98, 99, 100, which is in point, if not
" all-fours, with the present case. Johnson v. Dooley, 72
" Ga. 297.

' The doctrine is, in great measure, taken from Jones v.
" Smith, 1 Hare, 55, which was affirmed on appeal. 1 Phil-
' lips, 244.

" The conclusion deduced from all the English authori-
" ties by an eminent commentator, is, that the principle is
" well established, 'that whatever is notice enough to excite
" attention and put the party on his guard and call for in-
" quiry, is also notice of everything to which it is after-
" wards found that such inquiry might have led, although
" all was unknown for want of the investigation; that is,
" where a person has sufficient information to lead him to a
" fact, he shall be deemed cognizant of it.' 2 Spence Eq.
" Jur. 757, and cases cited in notes (b) and (c) there.

" The section of our own Code under consideration was
" designed to protect a possession held under a title acquir-
' ed in *good* faith, and *not one taken in disregard of the*
" *rights of another person*, of whose title the claimant had
" been informed, and about which, with proper inquiry, he
" might have had full knowledge, if he had made the re-
" quisite effort to inform himself.

" 2.—This court has carried this principle so far as to
" hold that a possession originating in fraud, cannot be
" *tacked* to one subsequently acquired, in order to complete
" the term of years necessary to give the tenant title by
" prescription, though such tenant be an innocent purchas-
' er from the fraudulent grantor. 63 Ga. 360."

In Cowart v. Young, 74 Ga. 694, 696, it is said:

"It is now too well settled in this State to require argument or demonstration, that if a person takes possession of land which he knows does not belong to himself or any one from whom he purchases, no prescription will run in his favor, however long he may hold the possession of the same. His possession, under these circumstances, originated *in fraud, and time will not cure or sanctify the fraud.*"

"Prescription does not run in favor of one buying with full knowledge that title is in *third party.*" 80 Ga. 178-186.

Fourth—As to Estoppel—None if Deed Recorded.

To this proposition, see accompanying brief of associate counsel, Mr. Erwin, citing and quoting the recent decision of this court *in re* Wiser v. Lawler, 189 U. S. 271, and the authorities there reviewed, which fully cover the conditions in the case at bar, and are conclusive.

In Brant v. Virginia Coal & Iron Company, 93 U. S. 326, 337, it is held as follows:

"For the application of the doctrines of equitable estoppel, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury." (H. N. 2.)

"Where the estoppel relates to the title of real property, it is essential to the application of the doctrine, that the party claiming to have been influenced by the conduct or declarations of another was *himself* not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to *both* parties, or *both* have the same means of ascertaining the truth, there is no estoppel." H. N. 3.)

In stating the case and delivering the opinion of the court, Mr. Justice Field said:

" The purchaser was bound to take notice of the title. He " was directed to its source by the pleadings in the case. " The doctrine of *'Caveat Emptor'* applies to all judicial " sales of this character; the purchaser takes only the title " which the *Mortgagor* possessed." (pp. 335, *et seq.*)

" Silence will not always work an estoppel, for silence " may not always be inequitable, and, moreover, a person " is not bound under all circumstances to speak out. He " may not, for example, be bound to declare that which is " *a matter of record*, and of which he has a right to pre- " sume the other party has notice."

Bispham's Principles of Equity, ! 284.

" The party setting up the estoppel must actually be de- " ceived by the conduct of the other party. *If he acts with " a full knowledge of the rights and title of the other party, ' he cannot complain if that title is subsequently asserted.*"

Bispham's Principles of Equity, § 289, citing list of authorities, including: Lewis v. Ford, 87 Ala. 143.

" As to the question of 'Estoppel,' 'res adjudicata,' *gener-* " *ally*, see:

Russell v. Place, 94 U. S. 606;
Goodman v. Winter, 64 Ala. 410, 430-1.

The application of the foregoing precedents to the situation as presented by the particular facts outlined in this immediate connection, *supra*, and patent on face of the record at large, is so obvious as to call for no comment.

VIII.

THE ALABAMA AND GEORGIA COMPANY IS A NECESSARY PARTY.

The contention of Petitioner's counsel, that The Alabama and Georgia Manufacturing Company, whether of Georgia or of Alabama, was not a necessary party to the Robinson bill, cannot, we respectfully insist, be maintained.

We need not controvert the general doctrine recognized in most jurisdictions, that the mortgagor is not a necessary party to foreclosure proceedings where it is made to appear that he has, prior to the foreclosure suit, parted with all his interest in the property.

In the first place, the complainant so framed his bill as to render The Alabama and Georgia Manufacturing Company of Georgia not only a proper, but a necessary party.

In the second place, it is not made to appear that The Alabama and Georgia Manufacturing Company (the Alabama corporation,) has parted with all its interest in the mortgaged property.

As to the first proposition, it is to be observed that the complainant in the Robinson bill expressly prays for personal decrees against said Georgia Company as follows:

1. For an account of the bonded debt. 2. For an account of attorneys' fees, and that said company be required to pay the same, and all costs of the foreclosure suit, by a short day to be named in the decree. 3. That said company, by name, be debarred and forever foreclosed of and from all equity of redemption in its property and riparian rights. 4. That said company deliver up all papers, deeds, and other writings in its power, custody or control relating to the premises. 5. That an injunction issue against said company. 6. That a receiver be appointed for said company. 7. That other or further relief be granted.

Thus it is seen that the frame of the bill, itself, makes the Alabama and Georgia Manufacturing Company of Georgia a necessary and indispensable party, inasmuch as the court could not have granted a solitary prayer of the bill without the presence of that company.

As to the second proposition, the only basis for the position taken, that the Alabama and Georgia Manufacturing Company, (The Alabama corporation,) has parted with its title and interest in the Alabama property, is the meagre extracts from certain alleged foreclosure proceedings and sale by a sheriff or receiver in the Superior Court of Troup County, Georgia, appearing in the record of the Robinson suit, indicating that the Huguley Manufacturing Company of Georgia had purchased the property so sold.

Inasmuch as it is patent, under the uniform decisions of this court, and most others, (some of which have been reviewed under our "IV" head of this brief), that a court of equity cannot by its own decree, or by its commissioner, or sheriff, or receiver, or other officer, sell and convey real property located in another State, this allegation is fatally insufficient to show that said company has been divested of its interest in the Alabama property.

While it is true all necessary intendments will be made in favor of the regularity and validity of the proceedings and judgment of a court of general jurisdiction, and that presumption might perhaps have been indulged in this case if the averment had simply been that the property had been sold under foreclosure proceedings in the Troup County court, here, there is no such averment. On the contrary, the *quo modo* is precisely averred, viz: that *the sale was made by the sheriff*. The averment that the sale was made by the sheriff negatives any idea of a sale and conveyance by the court, and by the party having the legal title and subject to the jurisdiction of the court, and conveying pursuant to its decree in addition to the sheriff's deed.

It is sufficient to say, that the Alabama and Georgia Manufacturing Company (the Alabama corporation,) was no party to the Robinson suit, in which these alleged proofs were made. That it has a right to be heard to controvert the validity of any foreclosure and sale alleged to have been made by a proceeding in Troup County, Georgia, of its property situate in Alabama.

The evidence taken in the Robinson suit, to which it was not a party, is not even admissible against it, much less is it conclusive.

But sufficient appears upon the face of the allegations in the pleadings in the Robinson suit, to show that said Troup County proceedings were certainly not effective to convey title out of the Alabama and Georgia Manufacturing Company of Alabama, to the Alabama property.

Indeed, the answer of the Riverdale Cotton Mills to the Alabama bill, (Rec. p. 518,) distinctly avers:

" That said Troup County sale was made and advertised " in Georgia, and neither made nor advertised in Alabama, " *nor has said Huguley Manufacturing Company ever ac-* " *quired any title or claim to the same by proceedings in Ala-* " *bama.*"

On the other hand, the Alabama bill of the Alabama and Georgia Manufacturing Company and the Huguley Manufacturing Company (the *Alabama* corporations) distinctly, in paragraph First (Rec. p. 486,) avers title in the Alabama and Georgia Manufacturing Company (the *Alabama* corporation,) and in the seventh paragraph (Rec. p. 492,) it is averred that the Huguley Manufacturing Company (the Alabama corporation), had purchased the same, but it is nowhere averred that title had been conveyed to it, or that it was more than the equitable owner. Nor is it anywhere averred in said Alabama bill, that the claim of the Huguley Manufacturing Company, (the Alabama corporation,) is in any way dependent upon the alleged Troup County proceedings.

It is therefore pure assumption that the Alabama and Georgia Manufacturing Company of Alabama, is not the holder of the legal title to said Alabama property, and is not deeply interested in its protection.

In the third place, irrespective of the sufficiency of the allegations of the bill, to show regular and efficacious proceedings in the Troup and Harris Counties, Georgia, chancery sale, to pass the interest of the said company in the

property, such divesture of its title occupies a different footing, as respects its status with reference to subsequent foreclosure proceedings, than would the company's own transfer or assignment.

Worthington v. Lee, 2 Bland's Chan. Rep. 678.

In the above cited case the mortgagor's equity of redemption, as alleged in the case at bar, was sold under judicial process, and upon a bill subsequently filed for foreclosure it was urged that the mortgagor, or rather his heirs (he being dead), were not proper or necessary parties. The court, after referring to cases of assignment of the equity of redemption, says:

"On the contrary, instead of the mortgagor's having "been divested of his estate by an assignment which he can- "not controvert, and so as to leave him in no way liable, "his equity of redemption alone, has been taken in execu- "tion and sold; the fact and validity of which sale he may "deny, and put in issue by an action of ejectment or by a "suit in equity of this kind, involving a decision upon the "right. Hence, it is essentially necessary, that this ques- "tionable title to the equity of redemption, as derived from "the judicial sale should be entirely put to rest by calling "before the court, as well the mortgagor, as him who claims "as purchaser at the judicial sale."

Again, besides being interested in the account prayed, of the mortgage debt and attorney's fees, the mortgagor in the case at bar is liable personally for any balance of the mortgage debt which may remain after applying the net proceeds of sale, and that liability was incapable of being enforced in any proceeding to which it was not a party.

In the said case last cited, *supra*, the court further said:

"In the stating of such an account the mortgagor has a "direct interest; because it fixes the amount of his interest; "and the mortgagee also has an interest in it, * * * be- "cause, in so far as the mortgaged property fails to produce "satisfaction of the amount so shown, the mortgagor may "again have recourse to his judgment at law, or avail him- "self of any other proceeding, either at common law or in "equity, to enforce payment of such unsatisfied balance, "and, therefore, upon this third ground, also, it is proper "that the mortgagor should be a party defendant to this "suit."

If it should be contended that the mortgagor is merely a proper, and not a necessary party, to the taking of the account, that might be true in those cases where a *personal* decree against the mortgagor for the *balance* of the mortgage debt, after applying the proceeds of sale, could not be, or was not, sought in the foreclosure proceedings.

In the case at bar, a personal decree *was* sought and actually rendered against the alleged mortgagor, The Alabama and Georgia Manufacturing Company of Georgia, both for the full amount of the mortgage debt, to be paid in thirty days from the decree, and execution was also awarded for any *balance* remaining unsatisfied from the sale. (Rec. pp. 356, 360, 362, 462, and see p. 4 of this brief.)

To such a decree the said company was not only a *proper*, but a *necessary* party.

In Weldon v. Fritzlen, 123 Fed. 608, 613, (decided April 2, 1904,) the court said:

" In Thompson v. Dixon, (C. C.), 28 Fed. 5, it is said:

" 'There is but one cause of action in the case, which is the " foreclosure of the mortgage, and the proper adjustment " of the several liens upon the property. To this action the " *mortgagor*, who is the holder of the equity of redemption, " and who is liable for any *deficiency*, is a *necessary* party. " He is, indeed, the *principal* party defendant, resides in the " same State with the plaintiff, and cannot be ranged on " the same side with the plaintiff for the purpose of making " a case removable to the Federal court'."

" In a suit to foreclose a mortgage the holder or holders " of the *legal title* to the property are *necessary* parties, in " order that the decree entered, and sale thereunder, may " cut off their equity of redemption. Such holder or holders " of the legal title, and all persons against whom the plaintiff demands a *personal* decree for the indebtedness due, " are parties *necessary* to the case, and are *adversary* " parties to the plaintiff, hence *necessary parties defendant* " to the suit."

To the same effect, see:

Story's Eq. Plead. (9th ed.), §§ 72, 195, and authorities cited;

Ribon v. Chicago, etc. R. R. Co., 16 Wall. 446.

Again, the bill expressly claims, and prays for the allowance of reasonable attorneys' fees to complainant in the foreclosure proceedings (although none are stipulated for in the mortgage, (Rec. pp. 3, 123-130.) If it should be said that the mortgage debt is liquidated and fixed by the mortgage, and that therefore the mortgagor, while a proper party was not a necessary party, to the taking of the account of the mortgage debt, that contention could not be maintained in respect of the attorneys' fee.

The claim asserted in the bill is to a reasonable attorney's fee, and even if the mortgage had stipulated for a reasonable attorney's fee, the *amount* of that fee could only have been determined in one or the other of three modes: 1. By agreement of the parties. 2. By a jury in a proper action. 3. On reference to a master in the foreclosure proceedings.

It is beyond the realm of doubt or question that the mortgagor would be an indispensable party to either of these methods of determining the amount of such reasonable fee; and this, too, whether it had or not, disposed of its interest in the mortgaged property, because, notwithstanding such debt, including the attorney's fee, as the property failed to pay on the sale thereof.

"Where a person will be directly affected by a decree, he is an indispensable party."

Williams v. Bankhead, 19 Wall. 563-572.

"Both at law or in equity a suit upon a written instrument must be brought in the name of all who are *formal* parties to it ,and who retained an interest in it."

Nashville & D. R. R. Co. v. Orr, 18 Wall. 471.

"No final decree can be rendered affecting the parties to a contract sued on, without making them *all* parties to the suit."

Gregory v. Stetson, 133 U. S. 579.

"Corporations themselves are indispensable parties to a bill which affects their corporate rights or liabilities."

Swan Land & Cattle Co. v. Frank, 148 U. S. 603.

As to 'Necessary Parties in Equity,' see note to

Marshall v. Beverley, 18 U. S. (5 Wheat. 313.)

IX.

THE EQUITY OF REDEMPTION OF THE ALABAMA AND GEORGIA MANUFACTURING COMPANY OF ALABAMA, AND ITS PRIVIES, IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The Huguley Manufacturing Company, of Alabama, was chartered February 27, 1890, (Rec. p. 532.)

The confirmation of sale, made under the Robinson bill, was entered June 25, 1896, (Rec. p. 395,) and under color of it the possession of the Alabama corporations of the Alabama property was finally wrested from them.

No prescription in favor of the Huguley Manufacturing Company as against the Alabama and Georgia Manufacturing Company, could have run between Feb. 27, 1890, and June 25, 1896.

It follows, therefore, that if either of said Alabama corporations had any right in said property they were necessary parties to any valid decree of foreclosure or confirmation of sale, and any claim that one company had lost its rights to the other by prescription, and was therefore not a necessary party, is wholly untenable.

" Adverse possession to be effectual, must be, actual, con-
" tinued, adverse and exclusive; possession by a *third* per-
" son will not avail unless he was *in privity* wit hthe person
" claiming."

Doswell v. De La Lanza, 20 How. 32.

" Adverse possession must be a *pedis possessio*, or an actu-
" al possession."

Simmons Creek Coal Co. v. Doran, 142 U. S. 442.

" To make out an adverse possession for the statutory per-
" iod of ten years, by tacking the possession of several hold-
" ers together, *privity* between them must be shown, and
" *continuity* of possession without break or interval."

R. R. Co. v. Philyaw, 88 Ala. 270, (6 So. 837.)

" *Continuity* is an essential element of an adverse holding
" such as can ripen into a title. Different entries at differ-
" ent times, by different persons, *between whom there is no*
" *privity of estate, nor connected claim of rightful holding,*
" are but a succession of *trespasses,* and neither can furnish

" any support to the other. (Authorities;) nor can one ad-
" verse holder 'tack' together his own several holdings, when
" he has allowed another person to acquire an intermediate
" tortious possession before his own had ripened into a title."

Ross v. Goodwin, 88 Ala. 390, 395-6, (6 So. 682-3);
See, also:
Dothard v. Denson, 72 Ala. 541;
Beard v. Ryan, 78 Ala. 37;
Hughes v. Anderson, 79 Ala. 215;
Hulsey v. Clark, 49 Ga. 102; and
Gaines v. Hennen, 21 How. 553, 568-9, quoted under our proposition VII, *supra,* (subhead "Prescription.)"

Again, it is to be noted that this defense is sought to be set up, not by The Huguley Manufacturing Company, but by The Riverdale Cotton Mills.

" The statute of limitations is a personal defense, and also
" the only way in which statutes of limtiations are available
" as a defense is where they are *specially pleaded* at the
" proper time."

Gormley v. Bunyan, 138 U. S. 635, 34 L. 1086;
Campbell v. Holt, 115 U. S. 625;
Bolling v. Jones, 67 Ala. 508;
Huss v. C. R. & B. Co., 56 Ala. 472;

It is quite clear The Riverdale Cotton Mills does not claim by, through, or under The Huguley Manufacturing Company, and, therefore, cannot avail itself of the latter's right, if any, to plead the statute.

It is equally clear that it has never pleaded the statute. See its answer to the bill filed by The Alabama and Georgia Manufacturing Company and The Huguley Manufacturing Company in the Alabama State Court, (Rec. pp. 510-21); also, bill of complaint filed by The Riverdale Cotton Mills v. Alabama and Georgia Manufacturing Company, *et al.,* in Circuit Court, for injunction. (Rec. pp. 473-82.)

In neither the said answer nor the said bill of The Riverdale Cotton Mills is the defense of the statute of limitations set up.

But, we respectfully insist that the question as to a right of redemption existing in The Alabama and Georgia Manufacturing Company, cannot be raised at this stage of the proceedings.

The Robinson bill is framed on the theory that such a right of redemption exists, and in express terms prays that said The Alabama and Georgia Manufacturing Company may be debarred and foreclosed by the decree of the court, of *its* equity of redemption, and *its* said equity of redemption is the only one which is in terms prayed to be foreclosed in said bill.

After such a prayer in the bill, and a decree of the court expressly following that prayer, and the Petitioner being in the attitude of claiming under the foreclosure proceedings had under said bill, the Petitioner cannot now be heard to say there is no equity of redemption in the said The Alabama and Georgia Manufacturing Company.

The Riverdale Cotton Mills' claim to the property being derived solely by virtue of the said foreclosure proceedings instituted by said bill, the Petitioner cannot be heard to claim both *under* and *against* the bill.

EQUITY OF W. H. HUGULEY & COMPANY OR THE HUGULEY MANUFACTURING COMPANY, NOT CUT OFF.

Not only has the equity of redemption vested in the said The Alabama and Georgia Manufacturing Company of *Alabama,* as owner of the legal estate, never been barred by the statute, as demonstrated, but not even that set up by its privies, W. H. Huguley & Co., or The Huguley Manufacturing Company, (as the case may be,) if any such inured in favor of either or both by virtue of the said executions and sale under the Troup and Harris Counties, Georgia, proceedings, has ever been cut off by the later decrees of sale and of confirmation (conditional) entered by the Federal Circuit Court in Georgia. This, for the obvious reason, among others elsewhere pointed out in this brief, and likewise more fully argued in the brief of our colleague, that the prayer of the original Robinson bill, only asked, and the decree of sale and of confirmation in pursuance thereof, only provided, that the equity of redemption in those *in privity with* or claiming by, through or under the said *Georgia* corporation of The Alabama and Georgia Manufacturing Company, and *of those only,* should be so barred; whereas, it has been made

clear that no person or corporation claims or, under the express limitations of the latter's charter, *could* claim anything by, through or under the said *Georgia* company, in that it owned no property whatever it could ever have conveyed, and certainly none of the property in controversy, the title in and to all of which has remained vested throughout in the said original *Alabama* corporation. Hence, since the said W. H. Huguley & Co., or The Huguley Manufacturing Company, (as their interest may appear,) claim only under the *Alabama* company, and could claim under *no other,* whatever rights or equities may be held to have attached to either or both under the conditions set forth, were unaffected by the said decrees of the said Federal Circuit Court, and whether as execution creditors or as purchasers, they may still redeem. (See Assignment of Error, *"Twelfth.)"*

XI.

NO EVIDENCE ADDUCED SHOWING THAT THE RIVERDALE COTTON MILLS, AS A CORPORATION EITHER OF ALABAMA OR OF GEORGIA, HAS EVER COMPLIED WITH THE TERMS OF THE DECREE OF OCTOBER 15th, 1898, OR HAS ANY DEED OR EVEN A CHARTER, ENTITLING IT TO ANY STANDING AS A PETITIONER IN THIS COURT.

The last modified decree ever entered by the Circuit Court in this cause, to-wit, the belated decree of October 15, 1898, provided:

" And it is ordered and decreed that the purchaser do pay " into the court *within forty days* from this date the whole of " the balance of the purchase money of said property, etc., " * * * and that *upon the certificate of the Clerk* of the " fact of such payment, *thereupon* the commissioner, S. C. " Dunlap, Esq., *do execute and deliver* to said purchaser or " such person as he may designate, *a deed* to the property " sold," etc. (Rec. pp. 446-7.)

An examination of the record in this cause from the date of the rendition of the said decree up to the last entry thereon, compassing from page 447 (the date of said decree) up to 574 (the date of certification of the writ of *certiorari,*) will disclose no compliance with the terms stipulated in the former,

on the part of either L. Lanier or The Riverdale Cotton Mills, no such "certificate from the Clerk of the fact of such payment," and no deed from even the said *commissioner,* and not even a charter to the said alleged "Riverdale Cotton Mills," whether as a corporation of Alabama or of Georgia. That there has ever been any compliance with the bid, or that the Riverdale Cotton Mills has any deed of conveyance from even the said Commissioner, or that it has ever been incorporated in Georgia, as claimed, rests wholly upon the *allegations* of the ancillary bill, without proof to support either averment.

Per contra, Respondents' Alabama bill distinctly charges that the said "Riverdale Cotton Mills" was a corporation "organized only under the laws of *Alabama,*" (Rec. p. 489,) attaching an exhibit from the Auditor of the State of Alabama certifying that said corporation (The Riverdale Cotton Mills) was "authorized to transact business as a corporation *at Rivervicw, Alabama, and at no other place.*" (Rec. pp. 497-8.) And, as recited in the opinion of the Circuit Court of Appeals, "To this bill, filed in the State Court of Alabama, the appellee, joined by the other corporations made respondents therein, filed their joint and separate answer, demurrer, pleas and motion, the copy of which filed papers, as shown in the record, without the exhibits, covers ten and one-half closely printed octavo pages. In connection with which we note in the additional brief submitted for the appellee, this language: "It was absolutely necessary to file an answer in the Chambers county suit within thirty days after the filing of said bill to prevent the rendition of a decree *pro confesso.*" (Op. C. C. A. Rec. pp. 556-7, 127 Fed. 497-505.)

We submit, therefore, that there having been no evidence whatever adduced showing or tending to show any compliance with the terms of the decree of Oct. 15, 1898, by certificate of the Clerk of the fact or by deed from even the *commissioner,* as therein specifically provided as a condition precedent to the completion of the said sale within the forty days allotted; and inasmuch as there is no evidence of any charter to a corporation entitled "The Riverdale Cotton Mills," or of organization thereunder as a *Georgia* corporation, but, on the contrary, the proof shows and Petitioner, in its said joint and separate answer, etc., ~~noted~~, has formally admitted itself to be a corporation of *Alabama*, and as such stands committed to that *Alabama* forum, in the manner pointed out by the Circuit Court of Appeals,—this Honorable Court will hardly assume the mere averments of Petitioner to be true in face of the record itself, but should, we submit, rather withhold its recognition of the right claimed by said so-called "Riverdale Cotton Mills" as petitioner for its consideration.

XII.

THE COURT ERRED, ON A BILL BROUGHT SOLELY BY THE RIVERDALE COTTON MILLS, CLAIMING UNDER AND SUBSEQUENT TO THE DECREE OF OCTOBER 15, 1898, AND CHARTERED AFTER THAT DATE, IN ENJOINING SO MUCH OF SAID ALABAMA SUIT AS SOUGHT AN ACCOUNTING FROM THE WEST POINT MANUFACTURING COMPANY AND THE GALETON COTTON MILLS, FOR RENTS AND PROFITS DURING THE PERIOD OF THEIR POSSESSION, TO-WIT, FROM SEPT. 6, 1892, TO NOVEMBER 1898.

Respondents' assignment of error, No. 13, as certified up to the Circuit Court of Appeals, on the record from the lower court, states the foregoing proposition more fully, in the following words, to-wit:

" *Thirteenth.*—Said suit of the Alabama and Georgia " Manufacturing Company, and Huguley Manufacturing " Company, corporations of Alabama, pending in the State " Court of Alabama, being a suit for the purpose not only of " redemption of said mortgage property, but also for an ac- " counting for rents and profits from other persons, to-wit: " the Galeton Cotton Mills and West Point Manufacturing " Company, who are charged with receiving the rents and " profits from September 6, 1892, to November 1, 1898, prior " to the creation of the Riverdale Cotton Mills and prior to " the conveyance set up by the Riverdale Cotton Mills by the " commissioner of the said Circuit Court under decree of Oc- " tober 15th, 1898, it was error in said Circuit Court, at the " suit of said Riverdale Cotton Mills, brought in its own be- " half and in its right as such purchaser alone, to perpetually " enjoin said complainants in said Alabama suit from the " prosecution of said suit for accounting from said other de- " fendants to said Alabama suit who are not complainants in " said alleged ancillary bill."

This proposition is elementary. Whatever equities or rights may exist in favor of the Galeton Cotton Mills and West Point Manufacturing Company, they were competent to set them up as matters of defense in the Alabama suit, *as they have done.* As to the rents and profits between September 6, 1892, and October 15, 1898, they neither acquired or hold them under the Riverdale Cotton Mills, nor is any claim thereto set up by the Riverdale Cotton Mills, by assignment or otherwise.

Yet, the decree appealed from perpetually enjoins the Alabama suit against the Galeton Cotton Mills, and West Point Manufacturing Company, and enjoins the bringing of any new suit against those corporations. It is relief granted in favor of a *stranger* to the so-called ancillary bill, and as to rights in which the complainant in that bill has no concern.

There are a number of other important propositions in favor of Respondents, raised under the assignments of error as certified up from the Circuit Court to the Circuit Court o Appeals, (Rec. pp. 542-6), the force of which will be readily impressed upon the minds of this court, particularly those emphasized in the argument of our associate counsel, Mr. Erwin, to whose accompanying brief we respectfully refer the court.

Respectfully submitted,

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